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In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

JOSEPH PATRICK DOHERTY

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Nos. 662, 880, Dockets 88-4084, 89-4092

JOSEPH PATRICK DOHERTY, PETITIONER

v.

U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

Argued Jan. 19, 1990
Decided June 29, 1990

Before LUMBARD, FEINBERG, and PRATT, Circuit Judges.

GEORGE C. PRATT, Circuit Judge:

Joseph Patrick Doherty, a member of the Provisional Irish Republican Army ("PIRA") who has been imprisoned in this country since 1983, petitions this court to review: (1) an order of former Attorney General Edwin Meese III, dated June 9, 1988, that rejected Doherty's designation of the Republic of Ireland as his country of deportation; and (2) an order of Attorney General Richard Thornburgh, dated June 30, 1989, that denied Doherty's motion to reopen his deportation proceedings for the purposes of applying for asylum and for withholding of deportation. For the reasons that follow, we affirm the order of Attorney General Meese, reverse the

order of Attorney General Thornburgh, and remand for further proceedings.

BACKGROUND

Doherty's status in this country has been the subject of sustained litigation since 1983, and so far has given rise to four published court opinions, *Doherty v. Meese,* 808 F.2d 938 (2d Cir.1986); *United States v. Doherty,* 786 F.2d 491 (2d Cir.1986); *United States v. Doherty,* 615 F.Supp. 755 (S.D.N.Y.1985); *Matter of Doherty,* 599 F.Supp. 270 (S.D.N.Y.1984), familiarity with which is assumed. Throughout all these proceedings, Doherty has been detained in the Metropolitan Correctional Center in Manhattan.

The events leading to Doherty's arrest in the United States stem from his involvement in the shooting death of a British army captain in Belfast, Northern Ireland. On May 2, 1980, Doherty and three other members of the PIRA set up an ambush in a private home in North Belfast as part of a plan to surprise and attack a convoy of British soldiers. After the men had waited three or four hours, a car pulled up in front of the house and five members of the British Army's Special Air Services emerged. In an ensuing gun battle, one of the British soldiers, Captain Herbert Westmacott, was shot and killed. Doherty was arrested, charged with murder, and put on trial in Belfast, Northern Ireland; but before the court had announced a decision, Doherty and seven others escaped from the maximum security Crumlin Road prison where they were being held. Two days later the court convinced Doherty *in absentia* of murder and a number of lesser crimes, and sentenced him to life imprisonment.

Doherty successfully eluded the British authorities. Aided by the PIRA, he fled to the Republic of Ireland

and, using an assumed identity, eventually made his way to New York City where he escaped detection for another sixteen months, until June 18, 1983, when he was arrested by agents of the Immigration and Naturalization Service ("INS") while working in a bar on the Upper East Side of Manhattan.

Immediately after Doherty's arrest in New York, the United States Attorney for the Southern District of New York, on behalf of the United Kingdom, filed a formal petition for his extradition. The case was referred to District Judge John E. Sprizzo, who elected to hear the matter as an "extradition magistrate" pursuant to 18 U.S.C. § 3184. At about the same time, the United States' initiation of deportation proceedings against Doherty prompted him to apply for asylum. At Doherty's request, the deportation proceeding and request for asylum were held in abeyance pending the outcome of the extradition action.

On December 12, 1984, Judge Sprizzo ruled that Doherty's crimes in Northern Ireland were "political offenses" within the meaning of the extradition treaty between the United States and the United Kingdom, and that Doherty's extradition was therefore barred. 599 F.Supp. 270; *see* Treaty of Extradition Between the United States and the United Kingdom of Great Britain and Northern Ireland, Art. V(1)(c)(i), 28 U.S.T. 227, T.I.A.S. No. 8468 (effective Jan. 21, 1977) (extradition shall not be granted for offenses "of a political character"). Based on the highly organized, quasi-military nature of the PIRA, its mode of discipline and internal command structure, as well as the historical context of Irish-British conflict and the fact that Doherty's acts of violence were directed at soldiers rather than civilians, Judge Sprizzo concluded that Doherty's involvement in the ambush and his subsequent escape from prison were of a political character. According to Judge Sprizzo, "the facts of this case present the assertion of the

political offense exception in its most classic form." 599 F.Supp. at 276.

Unable to appeal Judge Sprizzo's extradition decision directly, *see Matter of Mackin,* 668 F.2d 122 (2d Cir.1981) (denial of extradition not appealable), the United States sought collateral review of the order by way of a separate action for declaratory judgment. The district court dismissed that action for legal insufficiency, however, 615 F.Supp. 755, and we affirmed the dismissal. 786 F.2d 491.

With the extradition matter completed, the deportation proceeding against Doherty resumed in September 1986. At this point, Doherty decided to take advantage of a provision in the immigration statute that allows a deportable alien to select the country to which he will be deported. *See* Immigration and Nationality Act of 1952 ("INA" or "act") § 243(a), 8 U.S.C. § 1253(a). Doherty wanted to be sent to the Republic of Ireland, where he faced only a 10-year sentence of imprisonment rather than the life sentence awaiting him in Northern Ireland, and the Republic of Ireland had indicated its willingness to accept him. Therefore, at a hearing before Immigration Judge ("IJ") Howard I. Cohen, Doherty withdrew his application for asylum, conceded deportability, and designated the Republic of Ireland as his country of deportation.

The INS opposed Doherty's attempt to arrange deportation to the Republic of Ireland, claiming that it would be prejudicial to American interests not to return him to British authorities. Counsel for the INS stated that the case was of great concern "at the highest levels" of government. Despite the INS's objections, IJ Cohen ordered Doherty deported to the Republic of Ireland, as Doherty had requested, and the INS appealed immediately.

Four days after IJ Cohen's decision, Doherty petitioned for a writ of habeas corpus seeking immediate deportation

to the Republic of Ireland. Doherty claimed that the government was improperly detaining him during the administrative appeal of IJ Cohen's order solely to ensure that Doherty would be available for extradition under a newly signed treaty between the United States and the United Kingdom. The new treaty, which retroactively eliminated the political offense bar to extradition, had been ratified by the United States Senate but had not yet been acted upon by the British House of Commons. *See* 808 F.2d at 940.

The district court rejected Doherty's attempt to short-circuit the administrative process, however, and denied the petition. This court affirmed the decision of the district court, holding that the attorney general's appeal of IJ Cohen's order was reasonably grounded in his authority under § 243(a) of the act to deny deportation to an alien's designated country if, in the judgment of the attorney general, the deportation "would be prejudicial to the interests of the United States". 808 F.2d 938.

On March 11, 1987, the Board of Immigration Appeals ("BIA" or "board") decided the government's appeal but rejected its arguments and unanimously upheld IJ Cohen's order. The board stated that "we are unwilling to find that deportation to the Republic of Ireland would be prejudicial to the interests of the United States in the absence of clear evidence to support that conclusion." In a later decision, the board reopened the case to consider a motion by the government to introduce additional evidence concerning the prejudicial impact of deporting Doherty to the Republic of Ireland, but denied the motion after reopening, principally because it found that the additional evidence could have been presented at the hearing before IJ Cohen. At the request of the INS, the board then certified the case to Attorney General Meese pursuant to 8 C.F.R. § 3.1(h), a regulation that permits the attorney general to review

decisions of the board. Attorney General Meese accepted the case for review in October 1987.

On December 3, 1987, while the case was still pending before Attorney General Meese, Doherty moved before the board to reopen his deportation proceedings for the purposes of withdrawing his designation of the Republic of Ireland, redesignating the country of deportation, and submitting a new application for asylum and withholding of deportation. According to Doherty, this switch in his strategy was compelled by the implementation two days earlier of a new extradition treaty between the Republic of Ireland and the United Kingdom. Doherty feared that the new treaty, which altered the applicability of the "political offense" exception to extradition, would result in his certain extradition to the United Kingdom if he were deported to the Republic of Ireland, as he had originally requested. Without passing on its merits, the board referred Doherty's motion to reopen directly to Attorney General Meese.

In a decision dated June 9, 1988, Attorney General Meese rejected Doherty's designation of the Republic of Ireland as his country of deportation, holding under § 243(a) of the act that deportation there rather than to the United Kingdom would be prejudicial to United States' interests. He not only rejected Doherty's designation but also ordered him deported directly to the United Kingdom. The attorney general did not address the merits of Doherty's motion to reopen, however, but remanded that motion for consideration by the board.

The board granted Doherty's motion to reopen on November 14, 1988, in a 3-2 decision, holding that Doherty should be given the opportunity to apply for asylum and withholding of deportation. The board held:

> At the time of the hearing the reasonable expectation of the respondent was that he would be deported to Eire. The likelihood of his being deported to the United Kingdom appeared remote. * * * Given the state of the law at that time, the respondent could not have been expected to anticipate that he would not be deported to his country of choice. The respondent's failure to file for asylum under these circumstances is excusable.

The board further held that, like the change in Irish extradition law, the decision of Attorney General Meese represented a "changed circumstance[] which ha[s] arisen since the hearing". In addition, the board determined that Doherty had established a prima facie case for relief based on a well-founded fear of persecution in Northern Ireland. The board permitted reopening only for the purposes of applying for asylum and withholding and not for withdrawing his designation and redesignating the country of deportation.

At this point, the case was once again certified to the attorney general for review, again at the request of the INS. By order dated June 30, 1989, Attorney General Thornburgh "disapproved" the board's decision and denied Doherty's motion to reopen.

Doherty petitioned this court for review of both orders of the attorneys general. The petitions were consolidated for review, and we decide both here today.

DISCUSSION

A. Order of Attorney General Meese

Attorney General Meese determined that deporting Doherty to the Republic of Ireland would be prejudicial to United States' interests for two reasons: (1) "it is the policy of the United States that those who commit acts of violence against a democratic state should receive swift and lawful punishment, and it is thus in the interests of the

United States that respondent serve his sentence in the United Kingdom"; and (2) "a decision to deport respondent to Ireland rather than the United Kingdom would be injurious to our relations with the United Kingdom." Doherty contends that Attorney General Meese abused his discretion in rejecting his deportation to the Republic of Ireland, an argument we find somewhat curious at this point since Doherty now, too, seeks to avoid deportation to that country. We find no merit to Doherty's claim in any event, and we affirm the order of Attorney General Meese.

Section 243(a) of the act grants a deportee the one-time right to select the country to which he will be deported, but it also gives the attorney general the authority to reject the selection if he determines that the deportation would be prejudicial to the interests of the United States:

> The deportation of an alien in the United States provided for in this chapter, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, *in his discretion,* concludes that deportation to such country would be prejudicial to the interests of the United States.

INA § 243(a), 8 U.S.C. § 1253(a) (emphasis added).

As is apparent from the language of this provision, congress left the attorney general broad discretion to determine what constitutes prejudice to national interests. At an earlier stage of this case we noted that the statute provides no guidelines for determining what type of "prejudice" enables the attorney general to act; "[t]he requisite judgment requires an essentially political determination." 808 F.2d at 943. Thus the attorney general's finding of prejudice under § 243(a) "is essentially unreviewable" by a court. *Id.* at 944. We also stated that "[t]he implied corollary to the Attorney General's power to reject a designated country is the power to name the country to which the alien shall be deported." *Id.* at 941 (footnote omitted).

Attorney General Meese found that deporting Doherty to the Republic of Ireland, indeed to anywhere but the United Kingdom, would harm our relationship with the United Kingdom and would contradict our policy of punishing violence against democratic nations. Judgments of this nature are surely within the scope of the attorney general's discretion under § 243(a), and we are not permitted to second-guess them.

Doherty contends that the decision should nevertheless be overturned because of procedural error. He argues that the attorney general improperly relied on certain information, particularly an opinion letter from the Department of State, that was not in the record before the board. Although it might have been preferable if the attorney general had given Doherty an opportunity to comment on the letter, the letter itself did not reveal any new evidence against Doherty. It merely confirmed the attorney general's own conclusions about the foreign policy implications of the case. Moreover, the attorney general made it clear that his decision was based "on the facts established in the extradition proceedings" rather than on any evidence gleaned from extra-record sources. Therefore, this procedural error, if it was an error, was of no consequence to the outcome of the decision.

B. Order of Attorney General Thornburgh

Doherty moved to reopen his case in order to apply for asylum and for withholding of deportation, two separate forms of relief under the act. He also moved to reopen in order to withdraw his designation and redesignate the country of deportation, but the board did not permit, and Doherty does not here seek, reopening for these purposes. The right of asylum is established by § 208(a) of the act,

which authorizes the attorney general to grant asylum to an alien who demonstrates "a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1158(a); *see I.N.S. v. Cardoza-Fonseca,* 480 U.S. 421, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987). Asylum under § 208(a) is a broad form of relief, allowing the alien to remain in the United States where he can eventually apply for a lawful permanent residence. *See* 1 C. Gordon & S. Mailman, *Immigration Law & Procedure* §§ 1.03(6)(d)-(e) (1989).

Withholding of deportation is governed by § 243(h) of the act. Unlike asylum, which is discretionary, withholding of deportation is a mandatory remedy that prohibits the attorney general from deporting an alien to a country where there is a clear probability that his "life or freedom would be threatened" on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1253(h); *I.N.S. v. Stevic,* 467 U.S. 407, 104 S.Ct. 2489, 81 L.Ed.2d 321 (1984). Withholding of deportation under § 243(h) provides a more limited form of relief than asylum, however, barring deportation only to the nation where the alien faces persecution, but not to nonthreatening third countries.

If Doherty had pursued these claims at his original deportation hearing, there is little doubt that he would have been entitled to the evidentiary hearing he now seeks, because the right to apply for asylum or withholding of deportation carries with it the right to a hearing "where the likelihood of persecution can be fairly evaluated." *Augustin v. Sava,* 735 F.2d 32, 37 (2d Cir.1984); *see also Maldonado-Perez v. I.N.S.,* 865 F.2d 328, 332 (D.C.Cir.1989) (applicant for asylum "must be afforded an evidentiary hearing"). But, because Doherty had withdrawn his application for asylum in September 1986 as

part of his effort to arrange deportation to the Republic of Ireland, he can now have these claims heard only upon a reopening of his case. As the Supreme Court recently held, a motion to reopen for the purpose of applying for asylum and withholding of deportation may be denied for three independent reasons:

> First, [the BIA] may hold that the movant has not established a prima facie case for the underlying substantive relief sought. * * * Second, the BIA may hold that the movant has not introduced previously unavailable, material evidence, or, in an asylum application case, that the movant has not reasonably explained his failure to apply for asylum initially. * * * Third, in cases in which the ultimate grant of relief is discretionary (asylum, suspension of deportation, and adjustment of status, but not withholding of deportation), the BIA may leap ahead, as it were, over the two threshold concerns (prima facie case and new evidence/reasonable explanation), and simply determine that even if they were met, the movant would not be entitled to the discretionary grant of relief.

I.N.S. v. Abudu, 485 U.S. 94, 104-105, 108 S.Ct. 904, 911-912, 99 L.Ed.2d 90 (1988) (citations omitted)

In rejecting Doherty's motion to reopen, Attorney General Thornburgh did not address the first ground for denial under *Abudu,* the sufficiency of the applicant's prima facie showing of persecution. Instead, applying the second ground for denial, the attorney general held that neither the change in Irish law nor the decision of Attorney General Meese represented a change in circumstances sufficient to justify the reopening. The attorney general relied on the third ground for denial as well, holding that Doherty "would not ultimately be entitled either to the discretionary relief of asylum or to withholding of deportation." Finally, as an alternative basis for rejecting the

motion, the attorney general held that Doherty's withdrawal in September 1986 of his initial application for asylum constituted a "waiver" of his right to apply at a later time.

Reviewing Attorney General Thornburgh's decision within the *Abudu* framework, we conclude that in the singular circumstances of this case he abused his discretion in denying Doherty's motion to reopen.

1. *Prima Facie Case.*

Because he based his decision on other grounds, Attorney General Thornburgh held that "[i]t is unnecessary for me to address (and I do not) the question whether respondent has established a prima facie case for the substantive relief sought." Therefore, since the denial of a motion to reopen can be upheld only on the grounds set forth in the decision, *see Jen Hung Ng v. I.N.S.*, 804 F.2d 534, 538 (9th Cir.1986); *Mattis v. I.N.S.*, 774 F.2d 965, 967 (9th Cir.1985), we must assume for the purpose of this appeal that Doherty did meet his burden of demonstrating prima facie eligibility for relief, as the BIA found.

2. *New Evidence/Reasonable Explanation.*

The attorney general ruled that Doherty had failed to demonstrate a change in circumstances since his hearing that would justify reopening the case, because neither the change in Irish extradition law nor the decision of Attorney General Meese should have come as any surprise to Doherty. The attorney general emphasized that the diplomatic and parliamentary events that culminated in the new extradition treaty between the United Kingdom and the Republic of Ireland had been in progress for at least two years before actual implementation of the treaty on December 1, 1987. Rejection of Doherty's designation of the

Republic of Ireland was also foreseeable, according to Attorney General Thornburgh, because § 243(a) expressly authorizes such rejection, and because the INS had opposed Doherty's designation at the hearing. Thus, the attorney general concluded, the "new" circumstances offered in support of Doherty's motion to reopen were in fact entirely foreseeable at the time of the original hearing, and therefore did not provide a sufficient basis for granting the motion.

The flaw in the attorney general's approach to this issue is that it relies on a mistaken view of the law. Doherty was required to support his motion to reopen with "previously unavailable, material evidence", and a "reasonabl[e] expla[nation of] his failure to apply for asylum initially". *Abudu*, 485 U.S. at 104-05, 108 S.Ct. at 911. Neither the regulations nor the applicable decisional law require expressly or by implication that the new evidence be "unforeseeable"; indeed, such a rule would lead to absurd consequences. If a deportee were required to make his case not just on the state of facts and the law that existed at the time of the hearing, but instead on all "foreseeable" eventualities, there would be no end to the facts and issues potentially relevant to the case. Or, as the board in this case warned, "[i]f the respondent were expected to foresee and guard against the unprecedented circumstances which arose two years later, no alien would ever fail to apply for asylum to [sic] any country to which he might remotely be deported, if he had a fear of returning there." *Matter of Doherty*, BIA File No. A26185231, at 6 (BIA Nov. 14, 1988).

We also have reason to doubt that the intervening circumstances, especially the decision of Attorney General Meese, were as "foreseeable" as the government suggests. Until this case, it appears that an alien's designation of a country of deportation had never been rejected by the

attorney general on the basis of prejudice to national interests after the designation had been approved by the board. His power to make such a decision is expressly conferred by the statute to be sure, but one could hardly say that its exercise in this case was "foreseeable" when it had never once, in over 30 years, been invoked.

The board was on target when it found that Doherty had a "reasonable expectation" of being returned to the Republic of Ireland at the time of his original deportation hearing. What possible reason could Doherty have had for withdrawing his application for asylum and conceding deportability if his prospects of returning to his chosen country were nonexistent? He certainly could not have been motivated by a desire to delay the proceedings, as is a tactic in some cases, because delay at that time was working decidedly against him. *See Doherty,* 808 F.2d at 940.

The board gave careful consideration to the new developments supporting Doherty's motion to reopen, and it was satisfied that he had met the "heavy burden" of presenting previously unavailable, material evidence, and of reasonably explaining his decision to withdraw the initial application for relief. The board repeatedly deals with motions to reopen, and has, no doubt, developed a body of informed experience that helps it distinguish meritorious motions from those lacking in merit. Indeed, it is precisely the knowledge gained through such experience that gives us reason to defer to the board's decisions in most immigration matters.

In sum, not only did the attorney general overturn the board's findings because of a different view of facts, but he did so under a "foreseeability" standard that has no legal foundation. This we believe constituted an abuse of his discretion. *Carcamo-Flores v. I.N.S.*,805 F.2d 60, 68 (2d Cir.1986) (denial of asylum reversed where decision "leaves at least room for significant doubt as to whether

the appropriate standard was applied"); *Gonzales Batoon v. I.N.S.*, 791 F.2d 681, 686 (9th Cir.1986) (denial of motion to reopen is abuse of discretion where board "misapplied the principles upon which it purported to act").

Doherty supported his motion to reopen with other "new evidence", not mentioned above, including the report of a human rights group discussing political persecution in Northern Ireland, and an affidavit from his mother describing the history of mistreatment that Doherty and his family have suffered at the hands of British authorities. However, because we find that the change in Irish extradition law and the decision of Attorney General Meese were alone sufficient to satisfy Doherty's burden of producing "new, material evidence" and a "reasonable explanation" of his decision to withdraw his original application, we need not resolve the question of whether this additional "new evidence" would also have been adequate for that purpose.

3. ***Ultimate Entitlement to Withholding of Deportation.***

As another ground for denying the motion to reopen, Attorney General Thornburgh held that Doherty "would not ultimately be entitled either to the discretionary relief of asylum or to withholding of deportation." We first address Doherty's ultimate entitlement to withholding of deportation. According to the attorney general, Doherty was ineligible for that remedy because, under the statutory exceptions to withholding of deportation, "there are serious reasons for considering that [Doherty] has committed a serious nonpolitical crime outside of the United States", *see* I.N.A. § 243(h)(2)(C), 8 U.S.C. § 1253(h)(2)(C), and Doherty "assisted, or otherwise participated in the persecution of * * * person[s] on account of * * * political opinion". *See* I.N.A. § 243(h)(2)(A), 8 U.S.C. § 1253(h)(2)(A).

To begin with, the mandatory nature of the withholding remedy suggests that a determination of the applicant's ultimate entitlement to relief would be improper in the context of a motion to reopen. Unlike asylum, which is discretionary with the attorney general, withholding of deportation is mandatory upon a showing of statutory eligibility. If a person seeking to reopen his case establishes a prima facie case for withholding of deportation and introduces previously unavailable, material evidence, as Doherty has done, the attorney general simply has no discretion to decide that ultimately he would be "ineligible" for withholding of deportation, as that determination necessarily goes to the merits of the claim. As the Supreme Court stressed in *Abudu,* the attorney general's power to deny a motion to reopen based on factors other than the movant's failure to establish a prima facie case or the lack of new evidence is limited to "cases in which the ultimate grant of relief is discretionary * * * *not withholding of deportation*". 485 U.S. at 105, 108 S.Ct. at 912 (emphasis added); *see also Aviles-Torres v. I.N.S.,* 790 F.2d 1433, 1436 (9th Cir.1986) (abuse of discretion to deny motion to reopen where applicant established prima facie case for withholding of deportation); *Hernandez-Ortiz v. I.N.S.,* 777 F.2d 509, 518 (9th Cir.1985) (same); *cf. Motamedi v. I.N.S.,* 713 F.2d 575, 576 (10th Cir.1983) (abuse of discretion to deny motion to reopen where board "prejudg[ed] the merits of the case").

Considering the types of issues raised by Doherty's claim for withholding of deportation, the need for an evidentiary hearing should be obvious. His ultimate success or failure will depend on, among other factors, whether his crimes in Northern Ireland are judged "political" or "nonpolitical", and whether he "persecuted" others on account of their political views or was himself the victim of such persecution. Needless to say, these issues all raise

formidable questions of fact that cannot be adequately resolved in the absence of an evidentiary record. Examination of a fully developed record is a necessary precursor to the fair resolution of Doherty's claim, by an immigration judge, by the board, and, if it comes to it, by this court in another appeal. *Cf. Ananeh-Firempong v. I.N.S.,* 766 F.2d 621, 628-29 (1st Cir.1985) (questions as to whether mistreatment of applicant was "politically" motivated "are of a sort that are best considered at a hearing"). Thus, it was improper for the attorney general to prejudge the merits of Doherty's claim for withholding of deportation without the benefit of a record, and that claim must now proceed to a hearing.

4. *Ultimate Entitlement to Asylum.*

Whether Doherty's claim for asylum should also proceed to a hearing presents a more difficult question, because asylum, unlike withholding of deportation, is a discretionary remedy. As the Supreme Court held in *Abudu,* when an applicant seeks to reopen his case to file a claim for discretionary relief, such as a claim for asylum, the board (or, by implication, the attorney general) "may leap ahead, as it were, * * * and simply determine that * * * the movant would not be entitled to the discretionary grant of relief." 485 U.S. at 105, 108 S.Ct. at 912; *see also Cardoza-Fonseca,* 480 U.S. at 428 n. 5, 107 S.Ct. at 1211 n. 5 ("It is important to note that the Attorney General is *not required* to grant asylum to everyone who meets the definition of refugee. Instead, a finding that an alien is a refugee does no more than establish that 'the alien *may* be granted asylum *in the discretion of the Attorney General.*' ") (emphasis in original) (quoting *Stevic,* 467 U.S. at 423, 104 S.Ct. at 2497); *I.N.S. v. Rios-Pineda,* 471 U.S. 444, 449, 105 S.Ct. 2098, 2101-02, 85 L.Ed.2d 452

(1985) ("if the Attorney General decides that relief should be denied as a matter of discretion, he need not consider whether the threshold statutory eligibility requirements are met").

Nonetheless, it is a fundamental principle of our immigration law that the attorney general must base his discretionary decisions only on the "legitimate concerns" of the relevant statutory provision. *See Rios-Pineda,* 471 U.S. at 451-52, 105 S.Ct. at 2103; *Aviles-Torres,* 790 F.2d at 1437; *Mattis,* 774 F.2d at 968. Thus, the attorney general may abuse his discretion by acting arbitrarily, departing inexplicably from established policies, or discriminating invidiously against a particular group, *Rios-Pineda,* 471 U.S. at 451, 105 S.Ct. at 2103; *Bertrand v. Sava,* 684 F.2d 204, 212 (2d Cir.1982), or by giving effect to " 'considerations that Congress could not have intended to make relevant.' " *Wong Wing Hang v. I.N.S.,* 360 F.2d 715, 719 (2d Cir.1966) (quoting *United States ex rel. Kaloudis v. Shaughnessey,* 180 F.2d 489, 491 (2d Cir.1950) (L. Hand, J.)); *see also Jen Hung Ng,* 804 F.2d at 538 ("reliance by the BIA on improper factors in reaching a decision is an abuse of discretion that we are required to reverse").

The issue, then, is whether the attorney general based his discretionary decision on "legitimate concerns" of asylum. Despite the attorney general's broad discretion to base other types of immigration decisions on factors such as the government's political and foreign policy interests, our examination of the asylum statute convinces us that congress intended to prevent such factors from influencing asylum cases. In exercising his discretion in this case, Attorney General Thorburgh relied on just such improper factors. We therefore must reverse his order as to the asylum claim as well.

Examination of the history and purpose of the relevant legislation shows that congress intended to insulate the asylum process from the influences of politics and foreign policy, factors that had long dominated the refugee admissions process. Before World War II, the immigration law provided no right of asylum for aliens subject to persecution in their home countries. *See, e.g., United States ex rel. Giletti v. Commissioner of Immigration,* 35 F.2d 687 (2d Cir.1929) (deportation of Italian claiming persecution by fascist regime). With the passage of the Immigration and Nationality Act of 1952, Pub.L. No. 82-414, 66 Stat. 163, congress authorized the attorney general to "withhold" deportation of aliens from countries where, in his opinion, they would be subjected to physical persecution. 8 U.S.C. § 1253(h) (amended 1965, 1980). Unlike the current law, this older form of "withholding of deportation" was entirely discretionary, and it appears to have been rarely granted. *See* Note, *Judicial Review of Administrative Stays of Deportation: Section 243(h) of the Immigration and Nationality Act of 1952,* 1976 Wash. U.L.Q. 59, 100 (1976) (no published decisions in which relief had been granted under § 243(h)). The 1952 legislation also permitted the attorney general to admit persons "temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest". 8 U.S.C. § 1182(d)(5)(A). This provision, known as "parole", was the primary vehicle for the admission of refugees before the 1980s, and it, too, was wholly discretionary with the attorney general.

In 1968, the United States became a party to the United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6257, 606 U.N.T.S. 268 ("protocol"). The protocol adopted the definition of "refugee" used in the 1951 Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 ("convention"), to which the United States had not ac-

ceded. Under the protocol and the convention, a person's status as a "refugee" was determined without regard to political considerations or the country from which the person fled. Instead, a "refugee" was defined as one who

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality * * *.

Article 33 of the protocol prohibited the return of such a refugee to territories "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion."

Congress initially believed that the protocol was basically consistent with existing law, and that any inconsistencies could be reconciled by the attorney general in the exercise of his discretion. *See Stevic,* 467 U.S. at 417-18, 104 S.Ct. at 2494-95. In the 1970s, however, there was a growing perception that discretionary relief from deportation was being granted in a manner that conflicted with the protocol. In particular, many observers believed that asylum determinations were still being affected by ideological and geographical considerations that tended to favor individuals fleeing from communist nations over those seeking refugee from countries having favorable political ties with the United States. *See, e.g.,* Hansen, *Behind the Paper Curtain: Asylum Policy Versus Asylum Practice,* 7 N.Y.U. Rev.L. & Soc. Change 107 (1978).

Amid growing dissatisfaction with the existing law, congress in 1980 comprehensively revised the standards and procedures governing asylum. *See* The Refugee Act of 1980, Pub.L. No. 96-212, 94 Stat. 102. This legislation replaced the attorney general's ad hoc parole authority with a systematic procedure for adjudicating asylum

claims that was intended to eliminate geographical and ideological factors from consideration. *See Stevic,* 467 U.S. at 425-27, 104 S.Ct. at 2498-500; S.Rep. No. 96-256, 96th Cong., 2nd Sess. 1 (1979), *reprinted in* 1980 U.S. Code Cong. & Admin. News 141; Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980,* 19 San Diego L.Rev. 9,.36 (1981). The statute accomplished this goal by linking eligibility for asylum to the politically neutral definition of "refugee" set forth in the protocol. *See Cardoza-Fonseca,* 480 U.S. at 436, 107 S.Ct. at 1216.

Thus, in passing the Refugee Act of 1980, congress responded to the problems created by the attorney general's theretofore unlimited discretion over the admission of refugees. By defining eligibility in politically neutral terms, congress made it clear that factors such as the government's geopolitical and foreign policy interests were not legitimate concerns of asylum. To use Judge Learned Hand's terminology, these were "considerations that Congress could not have intended to make relevant" to asylum. *Shaughnessey,* 180 F.2d at 491.

The more limited nature of the attorney general's discretion in asylum cases can be illustrated by comparing it with his authority to grant suspension of deportation, INA § 244, 8 U.S.C. § 1254, and adjustment of status, INA § 245, 8 U.S.C. § 1255, the two major forms of "discretionary" relief from deportation other than asylum. With the adoption of immigration quotas and the elimination of the statute of limitations on deportation in the 1920s, deportation in some cases was seen to create unnecessary hardships, "[f]or there were may aliens whose residence in the United States was irregular but who had become worthy members of their communities and had established strong ties here." 3 C. Gordon & S. Mailman, *supra,* § 7.1(a).

To help mitigate the harshness of mandatory deportation, the attorney general was given the authority to suspend the deportation of aliens who had resided in the United States for at least seven years and could demonstrate "extreme hardship" if returned to their own country, INA § 244(a), 8 U.S.C. § 1254(a), especially where the hardship was the result of separation from family members legitimately living in the United States. *E.g., Carrete-Michel v. I.N.S.,* 749 F.2d 490, 494 (8th Cir.1984). For similar reasons, the attorney general was given the power to grant an "adjustment of status" to eligible aliens, and here, too, factors such as family ties and length of residence were critical. *E.g., Patel v. I.N.S.,* 738 F.2d 239, 243 (7th Cir.1984); *Jain v. I.N.S.,* 612 F.2d 683, 687-88 (2d Cir.1979), *cert. denied,* 446 U.S. 937, 100 S.Ct. 2155, 64 L.Ed.2d 789 (1980).

The statute itself does not set forth the factors to be weighed by the attorney general in suspending deportation or adjusting an alien's status. Both remedies "leave substantial room for the Attorney General to define the substantive grounds for relief." *LeBlanc v I.N.S.,* 715 F.2d 685, 690 (1st Cir.1983); *see also Hernandez-Patino v. I.N.S.,* 831 F.2d 750, 753 (7th Cir.1987) ("Congress, in refusing to define "extreme' hardship fully, avoided the substantive policy decision and has deferred to agency expertise.").

In asylum cases, by significant contrast, the substantive grounds for discretionary relief were not left to be determined by the attorney general. Indeed, one of the motivating forces behind passage of the Refugee Act was the "felt need to structure and control executive decisionmaking" in refugee matters. Anker & Posner, *supra,* at 36. Unlike the provisions for suspension of deportation and adjustment of status, the Refugee Act defines with specificity the category of aliens who should ordinarily be granted asylum,

and it provides concrete guidance as to those who should not. Moreover, while the presence of family members in the United States may work in favor of a potential asylee, *see* Helton, *The Proper Role of Discretion in Political Asylum Determinations,* 22 San Diego L.Rev. 999, 1015-18 (1985), keeping family members together is not an essential concern of asylum. In many cases, an applicant may be leaving family behind to escape persecution.

Consequently, the attorney general's broad "discretion" to grant suspension of deportation or adjustment of status does not necessarily provide a useful guide to the scope of his "discretion" to grant asylum. Even the attorney general himself acknowledged the unique characteristics of asylum in saying "that the decision to grant asylum to an alien is inherently a humanitarian act by the United States that is distinct from the normal operation and administration of the immigration laws." United States Department of Justice, Press Release (April 7, 1987) (announcing formation of Asylum Policy and Review Unit within the Department of Justice), *quoted in* Schmidt, *Refuge in the United States: The Sanctuary Movement Should Use the Legal System,* 15 Hofstra L.Rev. 79, 85 (1986).

Why, then, if congress intended to curtail the attorney general's authority over the asylum process, did it make asylum a discretionary remedy rather than a mandatory form of relief? The answer to this question becomes evident when we consider the drafting of the Refugee Act and the adminstrative practice since its enactment. The senate bill, as reported out of the Senate Judiciary Committee, originally made the grant of asylum mandatory upon an appropriate showing of persecution. S.Rep. No. 96-256, 96th Cong., 2nd Sess. 8-9 (1979). The house version of the provision, the one ultimately adopted in the conference report, vested the attorney general with the discretionary

authority he now possesses. The house report emphasized, however, that "[t]he Committee wishes to insure a fair and workable asylum policy which is consistent with this country's tradition of welcoming the oppressed of other nations and with our obligations under international law. * * * The Committee intends to monitor closely the Attorney General's implementation of the section so as to insure the rights of those it seeks to protect". H.R.Rep. No. 96-608, 96th Cong., 2nd Sess. 17-18 (1979); *see generally* Anker & Posner, *supra,* at 43-64.

Although there is some ambiguity here, it is apparent that congress did not intend to give the attorney general boundless "discretion" to make asylum decisions, for that would surely have frustrated the primary goals of the Refugee Act. Instead, as the house report suggests, congress merely desired to preserve some degree of flexibility in the administration of the asylum process in the context of a larger refugee program that involves, among other things, procedures for the admission of applicants at American offices overseas. In view of the inherent problems of running such a large and complex program, it is conceivable that a person who might otherwise qualify for asylum should be denied relief because, for example, he had a previous offer to settle in a nonthreatening third county, or had intentionally circumvented the admissions process available in his home country in order to achieve more immediate entry into the United States.

A decade of practice confirms that the board's discretionary denials of asylum to otherwise eligible candidates have been primarily for reasons of administrative fairness and efficiency, not to preserve our political relationship with the allegedly persecuting nation. Two types of cases have been the primary subjects of such denials. The first involves situations in which applicants have abused the asylum process by fraudulently circumventing

the overseas admissions process without sufficient cause. *See Sarkis v. Sava,* 599 F.Supp. 724, 755 (E.D.N.Y.1984); *Matter of Gharadaghi,* Interim Dec. No. 3001 (BIA Nov. 1, 1985); *Matter of Shirdel,* Interim Dec. No. 2958 (BIA Feb. 21, 1984); *Matter of Salim,* 18 I. & N. Dec. 311 (BIA 1982). Even here, however, the board has emphasized that abusing the admissions process "is only one of a number of factors which should be balanced in exercising discretion, and the weight accorded to this factor may vary depending on the facts of a particular case. * * * [T]he danger of persecution should generally outweigh all but the most egregious of adverse factors." *Matter of Pula,* Interim Dec. No. 3033 (BIA Sept. 22, 1987). The second type of discretionary denial involves refugees who have found a safe haven in another country before entering the United States. *See* Helton, *supra,* at 1007 & n. 49 (citing unpublished BIA decisions).

In summary, the history of the Refugee Act, its purpose, and the context within which it was enacted, all show that congress intended the attorney general to exercise a more limited role in asylum cases as compared with his role in other types of discretionary immigration matters. As demonstrated by the administrative practice before the board, this limited discretion has not been used to implement the government's foreign policy objectives, something that would clearly violate the spirit, if not the letter, of the Refugee Act, but rather to deter abuses of the refugee system, and to deny relief to aliens who have found safety elsewhere.

Reviewing Attorney General Thornburgh's decision in light of the above, we conclude that he based his decision in large part on the types of geopolitical concerns that congress intended to eliminate from asylum cases. The attorney general held that he would deny asylum for the following reasons:

First, it is "the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment." * * * Deporting respondent to the United Kingdom would unquestionably advance this important policy. * * * Second, the United States Government, through the State Department, has specifically determined that it is in the foreign policy interests of this country that respondent be deported to the United Kingdom. * * * Third, respondent knowingly and intentionally waived his claim to asylum, and for the reasons explained in Part IV, *supra,* I would not permit withdrawal of that waiver. Fourth, I believe that respondent's membership in and assistance of the PIRA in its acts of persecution, and the nature and number of his criminal acts in general * * * suggest that he is not deserving of equitable relief.

Decision of Attorney General Thornburgh at 28 (June 30, 1989) (citations omitted).

The first two reasons given by Attorney General Thornburgh simply restate the foreign policy concerns identified by Attorney General Meese when he barred Doherty's return to the Republic of Ireland. While such considerations were clearly relevant in that context, as indicated by the statutory standard of "prejudicial to the interests of the United States", INA § 243(a), 8 U.S.C. § 1253(a), congress did not intend the same factors to influence asylum decisions. In giving effect to these considerations, the attorney general seriously exceeded his discretion. The attorney general's third rationale, that Doherty "waived" his claim to asylum, is also improper, for the reasons explained below in part B.5 of this opinion. As for the attorney general's final reason, it not only assumes facts that would be more properly determined at a hearing, it also

depends in large measure on Doherty's "membership" in the PRIA, one of the very bases for which he claims persecution. In short, Attorney General Thornburgh exercised his discretion in denying Doherty's application for reasons that congress sought to eliminate from asylum cases, and, in doing so, he abused his discretion.

5. *Waiver.*

Finally, as an independent ground for denying the motion to reopen, Attorney General Thornburgh ruled that Doherty had "waived" his right to apply for relief. According to the attorney general, when Doherty conceded deportability to the Republic of Ireland and withdrew his initial application for asylum in September 1986, he "assumed the risk" that the Republic of Ireland might change its extradition law and that his designation of the Republic of Ireland might be rejected by Attorney General Meese. As Attorney General Thornburgh put it,

> [T]he integrity of the administrative process dictates that a deportee who, with the advice and assistance of counsel, makes such deliberate tactical decisions, not be permitted to disown those decisions merely because they ultimately result in action adverse to his interests. This is especially the case where the possibility of that action was not only foreseeable but foreseen.

The attorney general's reasoning is incompatible with any motion to reopen, however. If parties to a deportation hearing were held to "assume the risk" that subsequent developments might change the basis for the board's decision, no case would ever be reopened. For example, an alien could not reopen a case to introduce new evidence that after a change in leadership he would be persecuted in a country that had previously appeared nonthreatening. He would have "assumed the risk" that such events might transpire.

Moreover, we find the government's professed concern for the "integrity of the administrative process" unconvincing in light of its own actions in this case. The government's use of administrative and judicial processes has been exhaustive, to say the least. Its efforts have included, in Judge Friendly's words, an extended attempt "to escape from the longheld principle that when an extradition magistrate * * * refuses to certify a person sought to be extradited under an extradition treaty, the Government's sole recourse is to submit a request to another extradition magistrate." *United States v. Doherty,* 786 F.2d at 492-93. In addition, the government itself moved to reopen the case at an earlier stage of the administrative proceedings, even though its substantive motion was denied upon reopening. Finally, the certification procedure itself, a rarely used procedural device that is removed from normal administrative channels, has twice been invoked by the attorney general with respect to Doherty.

In short, it would be unfair to deny a motion to reopen for what amounts to a dubious procedural argument where the alien has otherwise satisfied the standards for reopening and where the government's own conduct in the case has demonstrated less-than-perfect adherence to procedural formalities. The "sporting theory of justice" has no place in deportation proceedings. *Matter of Martinez-Solis,* 14 I. & N. Dec. 93, 95 (BIA 1972).

CONCLUSION

The order of former Attorney General Meese is affirmed insofar as it rejected Doherty's designation of the Republic of Ireland as the country to which he would be deported and ordered him deported directly to the United Kingdom. The order of Attorney General Thornburgh denying Doherty's motion to reopen is reversed and the

case is remanded to the board for further proceedings consistent with this opinion.

LUMBARD, Circuit Judge, concurring in part and dissenting in part:

After seven years of proceedings before the immigration authorities, the Attorney General has decided that Doherty, who has admitted his deportability after illegal entry into the United States, may not reopen the matter and be heard on his claims for asylum as a political refugee and for withholding of deportation. The record supports the Attorney General's exercise of his discretion in denying further hearing. It also supports his decision that "[i]t is in the [United States'] interest that [Doherty] be sent directly to the United Kingdom," which he left as a fugitive from justice, and not to the Republic of Ireland. Consequently, I would affirm both orders of the Attorneys General.

On June 10, 1981, Doherty escaped from the Crumlin Road prison in Northern Ireland where he was being held during his trial for the killing of Captain Herbert Westmacott of the British Army on May 2, 1980. Two days after his escape, he was convicted for the murder and sentenced to life imprisonment. A fugitive from justice, he entered the United States illegally on or about February 1, 1982 and was arrested in New York City on June 18, 1983. At about the same time that a deportation warrant was filed against him, Doherty filed for asylum and withholding of deportation on June 28, 1983.

Having been thwarted in returning Doherty to the United Kingdom under the extradition treaty then in force, by a ruling of the District Court for the Southern District in December 1984 which under longstanding case-law was not appealable, the Government sought to expel him as an illegal immigrant and return him to the country from which he had fled.

In a strategic maneuver undertaken with advice of counsel, Doherty conceded deportability on September 5, 1986 and withdrew his applications for asylum and withholding of deportation. On September 12, 1986, the Immigration and Naturalization Service, which executes the immigration laws under the supervision of the Attorney General, requested the Immigration Judge ("IJ") to deport Doherty to the United Kingdom. Nonetheless, the IJ decided that Doherty should be returned to the Republic of Ireland. After the Board of Immigration Appeals ("Board" or "BIA") upheld the IJ, Attorney General Meese on June 9, 1988 decided in the best interests of the foreign relations of the United States that Doherty should be returned to the United Kingdom rather than to the Republic of Ireland.

Meanwhile, on December 3, 1987, Doherty moved for leave to reopen the deportation proceedings to reapply for asylum and withholding of deportation in view of what he claimed were changed circumstances. The Board, on November 14, 1988, voting 3-2, granted leave to reopen.

Attorney General Thornburgh on June 30, 1989 overruled the Board and denied leave to reopen. In a carefully reasoned opinion, he held that even if Doherty were permitted to reopen the deportation proceedings, he would be denied asylum—a form of discretionary relief—because his violent acts rendered him ineligible for a favorable exercise of discretion. This opinion demonstrates conclusively that Doherty has shown no new facts which are relevant to the Attorney General's decision to return him to the United Kingdom.

Doherty has enjoyed in full measure any right he has to a full and extended consideration of his claims. The Attorney General is the final authority on the return of illegal aliens. We should sustain his authority especially in matters which so intimately affect the foreign relations of the United States. The Attorney General's opinion shows that, whatever else may be done, the inevitable result is that Doherty will be sent back to the United Kingdom.

I

In *Doherty v. Meese*, 808 F.2d 938, 943-44 (2d Cir. 1986),[1] we held that, in immigration cases with weighty foreign policy implications, a decision of the Attorney General is "essentially unreviewable" when Congress has committed that decision to the unguided discretion of the Attorney General. Judicial inquiry in such cases is effectively limited to claims of unconstitutionality, fraud, or lack of jurisdiction, *id.* at 944 (citations omitted), and this case presents no colorable claims of that nature. Thus, we held then that the decision whether to reject an alien's designation of the country to which he will be deported ("designation") under § 243(a) of the Immigration and Nationality Act ("Act" or "INA") is "essentially unreviewable" because the statute provides that such a decision is simply in the Attorney General's "discretion." 8 U.S.C. § 1253(a).

We now review a decision denying a motion to reopen deportation proceedings. Like the matter of designation, motions to reopen are committed to the discretion of the Attorney General. In numerous cases, the Supreme Court

[1] There, Doherty petitioned for habeas corpus relief from his detention pending the Government's administrative appeal of the IJ's decision granting Doherty's request to be deported to the Republic of Ireland rather than to the United Kingdom. Doherty contended that the Government's appeal was frivolous and was intended solely to keep him in the United States until after the effective date of the Supplementary Extradition Treaty between the United States and the United Kingdom. *See Doherty v. Meese*, 808 F.2d at 940. We affirmed the district court's denial of habeas relief because the Government clearly had a reasonable basis for pursuing the administrative appeal.

has held that such motions are discretionary in the Board. *See, e.g., INS v. Rios-Pineda,* 471 U.S. 444, 449, 105 S.Ct. 2098, 2101-02, 85 L.Ed.2d 452 (1985); *INS v. Phinpathya,* 464 U.S. 183, 188 n. 6, 104 S.Ct. 584, 588 n. 6, 78 L.Ed.2d 401 (1984); *INS v. Jong Ha Wang,* 450 U.S. 139, 144 n. 5, 101 S.Ct. 1027, 1031 n. 5, 67 L.Ed.2d 123 (1981). Because the Board "is not a statutory body, but is wholly a creature of regulations issued by the Attorney General," *Greene v. INS,* 313 F.2d 148, 151 (9th Cir.) (citing 8 C.F.R. §§ 3.1 *et seq.*), *cert. denied,* 374 U.S. 828, 83 S.Ct. 1869, 10 L.Ed.2d 1051 (1963), the only source of the Board's discretion is the Attorney General. Furthermore, the Attorney General always has authority to review a decision of the Board, *see* 8 C.F.R. § 3.1(h)(1). Thus, because the Board has discretion in this area, the Attorney General *a fortiori* has discretion at least as broad.[2]

Since we affirm Attorney General Meese's discretionary rejection of Doherty's designation because it is "essentially unreviewable," and since Attorney General Thornburgh's discretionary decision not to reopen proceedings is likewise "essentially unreviewable," we should also affirm the Thornburgh order. We had no basis for reversing the Attorney General in *Doherty v. Meese,* and we have none now.

Motions to reopen "are disfavored in deportation proceedings" for the same reason that petitions for rehearing and motions for new trials based on newly discovered evi-

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[2] The Attorney General's discretionary authority to decide or even to countenance motions to reopen derives from those portions of the Act providing that "[t]he Attorney General shall be charged with the administration and enforcement of" the Act and "shall . . . perform such other acts as he deems necessary for carrying out his authority under the provisions of" the Act. INA § 103(a), 8 U.S.C. § 1103(a). This language places no constraints on the decisionmaking authority that it confers upon the Attorney General.

dence are disfavored: "There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases." *INS v. Abudu,* 485 U.S. 94, 107, 108 S.Ct. 904, 913, 99 L.Ed.2d 90 (1988). Doherty has had seven years to develop and present his case yet he has failed to convince the Attorney General. When the Attorney General decides, after a careful review of the voluminous record, that a drawn-out case such as this no longer merits attention, we are in no position to contradict that judgment.

There is a special reason for judicial restraint in cases such as this. As compared with officials of other administrative agencies, "INS officials must exercise especially sensitive political functions that implicate questions of foreign relations, and therefore the reasons for giving deference to agency decisions on petitions for reopening or reconsideration in other administrative contexts apply with even greater force in the INS context." *Abudu,* 485 U.S. at 110, 108 S.Ct. at 914-15 (footnote omitted). There can be no doubt that political judgments are at the heart of the decision not to reopen this case. As we stated in *Doherty v. Meese,* the Doherty matter "affects not only the relations of the United States with the United Kingdom and the Republic of Ireland, but also the complicated mutlilateral negotiations concerning efforts to halt international terrorism." 808 F.2d at 943. To prolong these proceedings after the Attorney General has drawn the line is to upset a policy decision that affects international relations and that accordingly should be " 'largely immune from judicial inquiry or interference,' " *id.* (quoting *Harisiades v. Shaughnessy,* 342 U.S. 580, 589, 72 S.Ct. 512, 519, 96 L.Ed. 586 (1952)).

The denial of Doherty's motion to reopen was made not by an inferior INS official but by the Attorney General

himself in a thorough and reasoned signed opinion. The Attorney General, as a member of the Cabinet who reports to the President and is conversant with the views of the administration, expresses the views of the Government. When the Attorney General makes a judgment on an essentially political question, we usurp the executive's authority when we review that decision for infirmities less grave than the most serious violations of law. *See Doherty v. Meese,* 808 F.2d at 944.

The majority states that the Board has "developed a well of informed experience" concerning motions to reopen and that "it is precisely the knowledge gained through such experience that gives us reason to defer to the Board's decisions in most immigration matters." Thus, the majority implicitly concludes, the Board's decision here deserves more deference than Attorney General Thornburgh's decision disapproving it. I cannot accept this conclusion. Matters which concern asylum and deportation are primarily matters of foreign policy and political judgment. The Attorney General has the ultimate authority in such matters, not the members of an inferior Board. Congress has placed the Attorney General at the top of the hierarchy of immigration officials; his word is the last word.

INS v. Abudu, 485 U.S. 94, 108 S.Ct. 904, 99 L.Ed.2d 90 (1988), should not be the sole focus of our inquiry because it addresses few of the foregoing concerns. In large part, *Abudu* simply summarized prior holdings regarding some of the grounds upon which the Board may deny a motion to reopen and held that the Board's denial of a motion to reopen under 8 C.F.R. § 3.2 or 208.11 should be reviewed under an abuse-of-discretion standard. Since *Abudu* involved a decision of the Board and not of the Attorney General himself, it provides little guidance for our review of the extraordinary case where, as here, the Attorney General has deemed certain principles and policies – for

example, that those who use violence to advance parochial ends are not to benefit from the privileges offered by our immigration law – so important that he has used his rarely exercised authority under 8 C.F.R. § 3.1(h)(1) to articulate and apply them. By dwelling on the reasons set forth in *Abudu* for denying a motion to reopen, the majority gives insufficient attention to the unusual posture of this case. Moreover, *Abudu* is not the last word on motions to reopen because the *Abudu* list of reasons for denying a motion to reopen was clearly not meant to be exhaustive. *See* 485 U.S. at 104, 108 S.Ct. at 911 ("There are *at least* three independent grounds on which the BIA may deny a motion to reopen.") (emphasis added).

II

Even under *Abudu,* the motion to reopen was properly denied for three reasons.

First, to the extent that the motion to reopen was for the purpose of applying for asylum, it was properly denied under the third *Abudu* factor, which provides that where a party moves to reopen to apply for discretionary relief, such as asylum,

> the BIA may leap ahead, as it were, over the two threshold concerns (prima facie case and new evidence/reasonable explanation), and simply determine that even if they were met, the movant would not be entitled to the discretionary grant of relief.

Abudu, 485 U.S. at 105, 108 S.Ct. at 912.

If the BIA may simply deny the motion because it believes the movant is undeserving of asylum, then surely the Attorney General may do the same. Here, Attorney General Thornburgh did just that with the following statement:

> In my discretion, I would not grant [Doherty] asylum. [I]t is the "policy of the United States that those who

> commit acts of violence against a democratic state should receive prompt and lawful punishment." *Matter of Doherty*, Mem. Att'y Gen. at 7 (June 9, 1988). Deporting [Doherty] to the United Kingdom would unquestionably advance this important policy. *See id.* at 6-7. [In addition,] the United States Government, through the State Department, has specifically determined that it is in the foreign policy interests of this country that respondent be deported to the United Kingdom. *Id.* at 7-8.

In so ruling, the Attorney General did not abuse his discretion.

The majority, disregarding the delicacy of this determination, notes that Attorney General Thornburgh, in ruling that Doherty ultimately would not be granted asylum, referred to the nation's political and foreign policy interests. According to the majority, such a reference was an abuse of discretion because the legislative history of the asylum provision supposedly indicates that Congress intended such interests to be ignored in the determination of whether to grant an asylum application. My reading of the legislative history, even accepting the majority's historiography, leads me to a different conclusion. Even if the asylum provision does define eligibility for asylum, it explicitly commits the asylum determination to the discretion of the Attorney General. Congress specifically rejected making asylum mandatory upon the appropriate showing. If Congress had wanted to limit the Attorney General's discretion to deny an asylum application, it knew how to do so. That the statute places no restrictions on his discretion tells us that Congress intended that there be none.

Moreover, a comparison of the two provisions indicates that the Attorney General has no less discretion in deciding asylum cases then he does in deciding where to deport an alien. The deportation provision states:

> "The deportation of an alien . . . shall be directed by the Attorney General to a country promptly designated by the alien . . . unless the Attorney General, *in his discretion,* concludes that deportation to such country would be prejudicial to the interests of the United States."

INA § 243(a), 8 U.S.C. § 1253(a) (emphasis added). Similarly, the asylum provision states:

> [T]he alien may be granted asylum *in the discretion of the Attorney General* if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

INA § 208(a), 8 U.S.C. § 1158(a) (emphasis added). To judge from these two subsections, the Attorney General has wider latitude to reject an asylum application than a deportation designation because the asylum applicant may not even be considered for discretionary approval unless the Attorney General also determines that the applicant is a refugee. Thus, as I have shown with respect to the Attorney General's discretion to deny a motion to reopen, if a discretionary decision under the deportation provision is essentially unreviewable, then a discretionary decision under the asylum provision should also be essentially unreviewable.

There is no basis in the statute for concluding that, once an alien is determined to be eligible for asylum, the Attorney General's discretion to deny asylum is limited to a narrow class of cases involving administrative irregularity.[3]

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[3] Doherty even fits into this category. The majority concedes that an asylum application may be denied when the applicant "intentionally circumvents the admissions process" in his home country to secure more speedy entry into the United States. This is essentially to say that

While Congress has established rules for determining who is eligible for asylum, it has created no rules for determining who among those eligible for asylum should receive that relief. The statute, in providing that "[t]he alien may be granted asylum *in the discretion of the Attorney General,*" INA § 208(a), 8 U.S.C. § 1158(a) (emphasis added), uses the broadest language possible to describe the authority of the Attorney General to make the ultimate asylum decision. Moreover, if, as the majority states, those eligible for asylum "should ordinarily be granted asylum," then the statute's provision that the ultimate asylum decision is "in the discretion of the Attorney General" would be surplusage; such a view would render meaningless this most significant portion of the statute when a much more plausible interpretation—that Congress declined to guide the Attorney General's decision as to who among those eligible should receive asylum—is available.

Second, again to the extent that the motion to reopen was for the purpose of applying for asylum, it was properly denied under that part of the second *Abudu* factor which permits denial of a motion to reopen "in an asylum application case [if] the movant has not reasonably explained his failure to apply for asylum initially." 485 U.S. at 105, 108 S.Ct. at 911. In deciding, properly, that Doherty waived his claim to asylum as a result of a tactical choice, Attorney General Thornburgh effectively ruled

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an applicant's manipulation of the process for personal benefit is grounds for rejection. Here, Attorney General Thornburgh implicitly decided that by withdrawing his application for asylum, conceding deportability, and then renewing the application when his plan backfired, Doherty was seeking to manipulate the process in a way that made him undeserving of asylum. Certainly the Attorney General may decide, first, that Doherty's rejection of asylum in a tactical maneuver and his subsequent renewal of his asylum application represent an attempt to have it both ways and, second, that the Government need not grant asylum to one who plays fast and loose with so great a privilege as asylum in the United States.

that Doherty failed this prong of *Abudu*.[4] Doherty's decision to withdraw his asylum application, which is the equivalent of a "failure to apply for asylum initially," was made with advice of counsel and with full knowledge that the Government was going to contest his designation and that the statute authorized Attorney General Meese to reject it.[5] It was a calculated risk on his part to admit deportability and not to pursue relief: his strategy was to be deported before the effective date of the Supplementary Treaty. Doherty asked to be deported knowing full well that such a procedural ploy might work to his disadvantage. Now that it has in fact worked to his disadvantage, he asks this court for a second bite at the apple for the obvious reason that he does not like the way his first plan worked out. Surely his miscalculation is not sufficient explanation of his failure to apply for asylum initially.

Attorney General Thornburgh points out that Doherty, having conceded deportability and failed to pursue an application for asylum or withholding, is in a position analogous to that of a defendant seeking to withdraw a guilty plea. One in such a position bears an extremely heavy burden of proof on a narrow issue: "[W]hen the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying

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[4] Although Attorney General Thornburgh termed this waiver argument an "independent" ground for decision, it is the equivalent of a challenge, under the second *Abudu* factor, to the reasonableness of Doherty's explanation of his failure to apply for asylum initially.

[5] He must be charged with knowing that there was a substantial risk Attorney General Meese would reject his designation. The same sentence of the INA that gives the alien the right to designate gives the Attorney General the right to reject the designation. In addition, the Government's position stated in open court on September 12, 1986, when Doherty conceded deportability and designated the Republic of Ireland, and maintained ever since is that it would contest Doherty's designation.

plea was both counseled and voluntary." *United States v. Broce,* 488 U.S. 563, 109 S.Ct. 757, 762, 102 L.Ed.2d 927 (1989). Doherty makes no claim that his decision not to pursue asylum was either uncounseled or involuntary. Moreover, "[a] defendant is not entitled to withdraw his plea [of guilt] merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." *Brady v. United States,* 397 U.S. 742, 757, 90 S.Ct. 1463, 1473, 25 L.Ed.2d 747 (1970). That Doherty misapprehended the relative merits of the various options open to him, which is what his claims boil down to, is simply a statement that he failed to apply for asylum and not a reasonable explanation for that failure.

The majority miscasts Attorney General Thornburgh's waiver argument as a claim that a party to a deportation proceeding assumes the risk "that subsequent developments might change the basis for the Board's decision." Attorney General Thornburgh did not make so nebulous and sweeping a claim. He spoke only of those subsequent developments—Attorney General Meese's rejection of his designation and his potential extradition from the Republic of Ireland to the United Kingdom—which Doherty knew or should have known had a strong likelihood of coming to pass and for which Doherty's mere distate is insufficient reason to excuse his unsuccessful strategem.

Third, the entire motion to reopen was properly denied under that part of the second *Abudu* factor which permits denial of a motion to reopen if "the movant has not introduced previously unavailable, material evidence." 485 U.S. at 104, 108 S.Ct. at 911 (citation omitted). The record fully supports Attorney General Thornburgh's decision that Doherty did not offer any previously unavailable, material evidence. The decision of Attorney General Meese to reject Doherty's designation and to deport Doherty to the United Kingdom was simply not

evidence. It was a legal consequence. Doherty's argument here is akin to that of one who moves to withdraw a guilty plea because the sentence, or even prison itself, has proved harsher than expected. Such withdrawal is impermissible. *See United States v. Prince,* 533 F.2d 205 (5th Cir. 1976) (defendant may not withdraw plea of *nolo contendere,* made after consulting counsel, when sentence proved harsher than expected). As Attorney General Thornburgh stated, "The ultimate decision in an administrative process cannot itself constitute 'new' evidence to justify reopening. If an adverse decision were sufficient, there could never be finality in the process."

Nor did implementation of the Extradition Act on December 1, 1987 constitute new evidence. Attorney General Thornburgh found that Doherty was extraditable from the Republic of Ireland to the United Kingdom even prior to December 1, 1987 on the basis of long-standing provisions of Irish law, and I see no reason to disturb this finding. The Extradition Act is simply cumulative evidence—if it is evidence at all—of his extraditability to the United Kingdom. As Attorney General Thornburgh noted, one of Doherty's arguments in support of the immigration judge's decision to deport him to the Republic of Ireland was that Irish law prior to the Extradition Act also provided for his extradition to the United Kingdom. Thus, the fact of his extraditability from the Republic of Ireland to the United Kingdom did not newly arise on December 1, 1987 but rather existed long before that date.

I also agree with the Attorney General that the additional documents, books, and affidavit in support of his motion to reopen were either cumulative, previously available, or immaterial. As the Attorney General stated, "None of the evidence supports the existence of a threat of persecution of which respondent was unaware or a material change in the character of a threat previously recognized."

III

To the extent the motion to reopen was for the purpose of applying for withholding of deportation, it was properly denied for two additional reasons.

In ruling that Doherty waived any claim he may have had to asylum, Attorney General Thornburgh also ruled that Doherty waived whatever claim he had to withholding of deportation. For the reasons stated above in Part II, this was a sufficient independent ground for his denial of the motion to reopen.

The motion to reopen was also properly denied under INA § 243(h)(2)(C), 8 U.S.C. § 1253(h)(2)(C), which provides that an alien "shall not" be granted withholding

> if the Attorney General determines that—
>
> * * * * *
>
> (C) there are serious reasons for considering that the alien has commited a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States. . . .

As is evident from the face of the statute, the majority's statement that "withholding of deportation is mandatory upon a showing of statutory eligibility" tells only half the story. In fact, it is mandatory for the Attorney General to *deny* withholding if *he* determines that the alien fails any of the tests in § 243(h)(2)(A)-(D). Although the Attorney General's determination is not discretionary, § 243(h)(2) states numerous reasons to deny withholding, and subsection (C) has a low burden of proof, *see McMullen v. INS*, 788 F.2d 591, 599 (9th Cir.1986) (only "probable cause" required). Thus, I believe that as long as the record is adequate and the Attorney General makes reasoned findings based on that record, his determination that the alien has failed any of the tests of § 243(h)(2), particularly that in subsection (C), should be a sufficient ground to deny a motion to reopen for the purpose of applying for withholding. Since the record is replete with Doherty's admissions of actions constituting violations of § 243(h)(2), and since the Attorney General's determination that Doherty failed the test in subsection (C) is a model of a reasoned decision based on the record, I think he properly denied the motion to reopen to the extent it was for the purpose of applying for withholding.[6]

Doherty admitted to all of the following at his 1984 extradition hearing. He was an officer in the Provisional Irish Republican Army ("PIRA") and committed acts dangerous to others on behalf of the PIRA,[7] which the United States Department of State has classified as a terrorist organization, *see* n. 6, *supra*. For example, in 1973, Doherty was convicted of and imprisoned for a firearms violation. In 1974, he was convicted of and imprisoned for smuggling 80

[6] Although Attorney General Thornburgh found that Doherty failed the test in subsection (A) as well, I focus on his decision under (C), as the facts relevant to that subsection are particularly compelling. However, I find his conclusion under (A) perfectly acceptable as well. Subsection (A) prohibits the Attorney General from granting withholding to any alien he determines to have "ordered, incited, assisted, *or otherwise participated in* the persecution of any person on account of . . . political opinion." § 243(h)(2)(A), 8 U.S.C. § 1253(h)(2)(A) (emphasis added). Doherty does not dispute that the official position of the United States is that the PIRA is a terrorist organization, *see* U.S. Department of State, *Patterns of Global Terrorism: 1988*, 33-34, 74-75 (1989); *McMullen*, 788 F.2d at 597, and the Board itself has found that the PIRA aims its violence at, among others, civilians who oppose the PIRA's objectives and methods. *See id.* at 600 ("The BIA found that the PIRA killed or attempted to kill those who publicly opposed their activities," and an active role in the PIRA "amounts to the assistance of this persecution on account of political opinion") (Goodwin, J., specially concurring). Because Doherty has admitted an active role in the PIRA and has embraced the PIRA without reservation, the Attorney General properly concluded that Doherty "otherwise participated" in persecution on account of political opinion.

[7] The PIRA, a radical offshoot of the IRA, "formed in protest to the perceived inefficacy of the IRA," *McMullen v. INS*, 658 F.2d 1312, 1315 (9th Cir.1981), which itself used violence to achieve its ends, *id.* Apparently, the founding members of the PIRA believed that the IRA was not violent enough.

pounds of explosives in a car hijacked by the PIRA. In 1980, in a van hijacked by the PIRA, he drove several of his PIRA confederates to a private Belfast house, while the van driver was held captive; took over the house and held hostage the family inside; and engaged in a firefight that resulted in the death of Captain Westmacott of the British Army.

As noted in the opinion dissenting from the Board's decision, "it is fortuitous that the civilian hostages [taken by Doherty and his associates] were uninjured in view of the fact that they were exposed to a gun battle." *Matter of Doherty*, No. A26 185 231, slip op. at 4 (BIA Nov. 14, 1988) (Morris, B.M., dissenting). Even if violence against a democratic government or against such a government's military personnel were a "political" rather than a "criminal" matter, which it surely is not, Doherty's participation in attacks against civilians has given Attorney General Thornburgh a substantial basis for concluding that Doherty has committed serious nonpolitical crimes outside the United States prior to his illegal entry.[8]

Given Doherty's admission of PIRA membership, of involvement in the Westmacott killing, and of offenses against innocent civilians; the low standard of proof under subsection (C); and the statutory imperative of denying

[8] The decision denying Doherty's extradition on the ground that his murder of Captain Westmacott was a "political" offense, *Matter of Doherty by Gov. of United Kingdom*, 599 F.Supp. 270 (S.D.N.Y. 1984), has no precedential value either for the Attorney General or for us. Offenses considered "political" for the purposes of extradition treaties may be considered "nonpolitical" for the purposes of the INA in general and of § 243(h)(2)(C), 8 U.S.C. § 1253(h)(2)(C), in particular. *See McMullen v. INS*, 788 F.2d at 596. In addition, "extradition determinations have no res judicata effect in subsequent judicial proceedings." *Id.* at 597 (citations omitted). Finally, that decision was not appealable under longstanding caselaw, *see United States v. Doherty*, 786 F.2d 491, 495 (2d Cir.1986); *Matter of Mackin*, 668 F.2d 122, 125-30 (2d Cir.1981), and we have therefore had no occasion for direct review of it on the merits.

withholding to one considered undesirable under § 243(h)(2), I believe that Attorney General Thornburgh's decision is unassailable. I fail to see what proper purpose will be served by granting a hearing on Doherty's withholding claim.

The majority, citing *Abudu*, states that "the attorney general's power to deny a motion to reopen based on factors other than the movant's failure to establish a prima facie case or the lack of new evidence is limited to 'cases in which the ultimate grant of relief is discretionary * * * *not withholding of deportation*'. [485 U.S. at 105, 108 S.Ct. at 912]" (emphasis added by majority). Thus, the majority implies, Attorney General Thornburgh erred by resolving this question as if withholding were a discretionary matter. I disagree.

Attorney General Thornburgh resolved Doherty's entitlement to withholding not as a discretionary matter but rather as a legal question governed by the rules set out in § 243(h)(2). Even if *Abudu* were the sole guide for our review, his decision regarding withholding would not be reviewable under the third *Abudu* factor. The real issue is the adequacy of the record and the rationality of the Attorney General's conclusion based on the record. Since the record and reasoning here were more than adequate, a further hearing would be a waste of time and would serve only to delay the final resolution of proceedings which have lasted seven years since Doherty's arrest in 1983.

IV

For the foregoing reasons, I would dismiss both petitions for review and affirm the orders of the Attorneys General.

APPENDIX B

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C. 20530

In re: Joseph Patrick Thomas Doherty (A26-185-231)

IN DEPORTATION PROCEEDINGS

This matter has been certified to me by the Commissioner of the Immigration and Naturalization Service (INS) from the decision of the Board of Immigration Appeals (BNA). 8 C.F.R. § 3.1(h)(1)(iii). On November 14, 1988, the BIA granted the respondent's motion to reopen these proceedings in order to allow him to apply for asylum and for withholding of deportation and to permit him to redesignate his country of deportation. *Matter of Doherty*, No. A26 185 231 (BIA Nov. 14, 1988). For the reasons set forth below, I disapprove the BIA's decision, and deny respondent's motion to reopen his deportation proceedings.

I.

1. Respondent is a 34-year-old native of Northern Ireland and a citizen of both the United Kingdom (U.K.) and the Republic of Ireland. He has been an active volunteer in the Provisional Irish Republic Army (PIRA) since 1972. The BIA summarized his criminal record as follows:

> He has an extensive criminal record in Ireland beginning with convictions as a juvenile for burglary and larceny. He was sentenced to probation, fines, and 1 month in a training school. At approximately age 15, the respondent joined Na Fianna Eireann, a youth organization in Ireland that is considered to be a stepping stone into the PIRA. When he turned 17, in 1972, he joined the PIRA as a volunteer. In 1973, he was arrested, and later convicted, for possession of a firearm. He was sentenced to 1 year in prison and he served 9 months. In 1974, he was arrested for possession of 80 pounds of explosives. He was convicted and sentenced to 10 years imprisonment. He served 5 years and 9 months of that sentence. During that term of imprisonment, the respondent attempted to escape, but he was unsuccessful. He was convicted of prison breaking with intent to escape and received a sentence of an additional 18 months of imprisonment. After his release from prison in December of 1979, he returned to the PIRA. On May 2, 1980, while on a mission for the PIRA, he was involved in a gun battle in which a British Army Captain was killed. He was tried and found guilty of murder, attempted murder, possession of firearms and ammunition, and belonging to a proscribed organization.

In re Doherty, No. A26 185 231, slip op. at 1-2 (BIA Mar. 4, 1985).

Throughout the course of these proceedings, respondent has never disputed the underlying facts relating to the last set of crimes. On May 2, 1980, he and several other PIRA members seized and occupied a private home, from which they planned to ambush British troops. In the ensuing gunfight with the troops, Captain Herbert Richard Westmacott, a British Army captain, was shot and killed. Respondent was arrested and charged with murder, attempted murder, illegal possession of firearms, and other offenses. On June 10, 1981, after trial, but before a decision was reached, respondent escaped from prison. On July 12, 1981, he was convicted, in absentia, of murder

and the other offenses with which he had been charged, and was sentenced to life imprisonment.

After his escape, respondent made his way to the United States, where he was arrested on June 18, 1983. A formal request for extradition was filed in the Southern District of New York on August 16, 1983. At about the same time, a deportation warrant was also filed against him. On June 28, 1983, respondent filed for asylum and withholding of deportation.

2. The extradition proceeding was brought pursuant to 18 U.S.C. § 3184 and Article VII of the then-existing Treaty of Extradition between the United States and the United Kingdom, Extradition Treaty, Oct. 21, 1976, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468 (effective Jan. 21, 1977) [hereinafter "Extradition Treaty"], under which "political offenses" were an exception to extradition. A hearing was held in the United States District Court for the Southern District of New York in March and April of 1984. In December 1984, the court ruled that respondent could not be extradited because the murder he had committed was "of a political character" within the meaning of the Extradition Treaty. The court thus denied the request for extradition. *Matter of Doherty by Gov't of United Kingdom*, 599 F. Supp. 270 (S.D.N.Y. 984).

Although the court determined that respondent was not extraditable, it rejected the contention that the proceedings against him in Northern Ireland had failed to provide due process. The court concluded:

> [B]oth Unionists and Republicans who commit offenses of a political character can and do receive fair and impartial justice and . . . the courts of Northern Ireland will continue to scrupulously and courageously discharge their responsibilities in that regard.

Matter of Doherty by Gov't of United Kingdom, 599 F. Supp. at 276.[1]

3. Immediately upon the conclusion of the extradition proceeding, the deportation proceeding went forward. It was delayed, however, for almost 18 months, from March 18, 1985, until September 3, 1986, as a result of a stay which was entered on respondent's motion, and which the INS opposed. *See Doherty* v. *Meese*, 808 F.2d 938, 941 (2d Cir. 1986).

On September 12, 1986, at a hearing before an immigration judge, respondent, through his counsel, withdrew the applications for asylum and for withholding of deportation that he had filed in June 1983, and conceded deportability.[2] Asked by the immigration judge whether he was saying that he "no longer wish[ed] to apply for asylum and [was] . . . waiving his right to asylum?", respondent's counsel replied, "[t]hat is correct, Your Honor." Respondent's counsel continued: "We would, at this time,

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[1] The United States challenged the denial of extradition by bringing an action under the Declaratory Judgment Act, 28 U.S.C. § 2201, in the Southern District of New York. The district court and the United States Court of Appeals for the Second Circuit both held, however, that bringing the extradition request before another judge was the only proper means of challenging the decision denying extradition. *United States* v. *Doherty*, 615 F. Supp. 755 (S.D.N.Y. 1985), *aff'd*, 786 F.2d 491 (2d Cir. 1986).

[2] *See* Transcript of Hearing at 36, 38-40, *Matter of Doherty*, No. A26 185 231 (BIA Sept. 12, 1986) [hereinafter "Transcript of Sept. 12 Hearing"]; *see also* Petition of Joseph Patrick Thomas Doherty for an Order to Show Cause for a Writ of Habeas Corpus at para. 43, *Doherty* v. *Meese*, 808 F.2d 938 (2d Cir. 1986) (No. 415, Docket 86-2335) [hereinafter "Doherty Petition"]; Affidavit of Mary Boresz Pike (Counsel for Respondent), sworn to Dec. 2, 1987, at paras. 10-14 [hereinafter "Pike Affidavit"].

withdraw the application for political asylum. The only thing that we would request would, of couse, be the opportunity to desingnate [sic] a country." *See* Transcript of Sept. 12 Hearing, *supra* note 2, at 38. The colloquy between the immigration judge and respondent's counsel continued as follows:

> Q. . . . I just want to be sure there won't be any application for political asylum and/or withholding of deportation, correct?
>
> A. That is correct.
>
> Q. No application for voluntary departure?
>
> A. That is correct.
>
> Q. In other words, there is no application for relief from deportation that you will be making?
>
> A. That is correct.

Id. at 38-39. Respondent designated the Republic of Ireland as his country of deportation, pursuant to 8 U.S.C. § 1253(a). The INS strongly opposed this designation on the ground that it would be prejudical to the interests of the United States to send respondent to Ireland. The INS explained to the court that the deportation of respondent to the United Kingdom was a matter of great interest at the highest levels of the federal government. Transcript of Sept. 12 Hearing, *supra* note 2, at 41-43, 47-48; Transcript of Hearing at 57, *Matter of Doherty*, No. A26 185 231 (BIA Sept. 19, 1986). The court denied the INS's request for permission to submit evidence of additional grounds for deportation, because respondent had conceded deportability and waived his claims to asylum and withholding of deportation. *See* Transcript of Sept. 12 Hearing, *supra* note 2, at 39-40.

One week later, on September 19, 1986, the immigration judge found respondent deportable on his own admissions for having entered this country in February 1982 by fraud

and without a valid immigrant visa. 8 U.S.C. §§ 1182(a)(19)-(20), 1251(a)(1).[3] Over the INS's strenuous objection, the immigration judge ordered respondent deported to the country of his designation, the Republic of Ireland.

At the time of the immigration judge's decision, respondent faced a ten-year sentence of imprisonment in Ireland under a "dual prosecution agreement" between Ireland and the United Kingdom. *Doherty* v. *Meese*, 808 F.2d at 940.[4] Respondent's consent to deportation and his withdrawal of his applications for relief from deportation were apparently prompted by the imminent ratification and implementation of the Supplementary Extradition Treaty between the United States and the United Kingdom, Supplementary Extradition Treaty, June 25, 1985, United States-United Kingdom, Exec. Report 99-17 (effective Dec. 23, 1986) [hereinafter "Supplementary Treaty"].[5] Under the Supplementary Treaty, respondent could have been extradited directly to the United

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[3] *See of Matter of Doherty*, No. A26 185 231 (BIA Sept. 19, 1986).

[4] It was also likely that respondent would be tried in the Republic of Ireland for his escape from prison in Belfast, Northern Ireland. *See* Doherty Petition, *supra* note 2, at para. 55.

[5] The Supplementary Treaty amended the Extradition Treaty. The Supplementary Treaty had been ratified by the United States Senate on July 17, 1986, and, at the time of the immigration judge's September 19, 1986 decision, was pending before the British House of Commons. Respondent apparently expected the House of Commons to ratify the treaty sometime in October 1986. *See* Doherty Petition, *supra* note 2, at para. 33. The Supplementary Treaty became operative on December 23, 1986.

Under Article 4 of the Supplementary Treaty, the "political offense" exception to extradition in the Extradition Treaty was eliminated with retroactive effect. Thus, ratification and implementation of the Supplementary Treaty might have rendered respondent subject to extradition, despite the prior district court decision denying such a request.

Kingdom, where, as noted, he faced a life sentence for murder. "[Respondent] thus urgently want[ed] to leave the United States for Ireland, where he face[d] only a ten-year sentence, before the British House of Commons act[ed] upon the treaty." *Doherty* v. *Meese*, 808 F.2d at 940.

4. The INS appealed the immigration judge's decision to the BIA. Respondent, however, in an attempt to prevent the INS from continuing to contest respondent's deportation to Ireland, petitioned the district court for a writ of habeas corpus, which was denied on September 25, 1986. *Id.* at 941. Respondent appealed to the Second Circuit.

On December 23, 1986, the Second Circuit affirmed the district court's denial of respondent's habeas corpus petition. In so doing, the court rejected respondent's contention that the government was resisting respondent's departure to Ireland solely for the purpose of assuring his continued availability for extradition to the United Kingdom upon final ratification of the Supplementary Treaty. The court stated that it had jurisdiction to intervene in the pending deportation proceeding "only if the Attorney General is clearly outside the discretion granted to him by Section 1253(a) in rejecting the Republic of Ireland and designating the United Kingdom and is clearly unreasonable in pressing his position through the administrative process." *Doherty* v. *Meese*, 808 F.2d at 942.

The court determined that the INS's appeal of the immigration judge's order to the BIA was not unjustified because it was reasonable for the Attorney General to conclude and to argue that the interests of the United States would be prejudiced by deporting respondent to Ireland. *Id.* at 943. The court stated that the judgment as to whether the interests of the United States would be prejudiced was "an essentially political determination." *Id.* The court also noted that "[t]he lack of precedent hardly

renders the government's position frivolous." *Id.* at 941 n.3. Further, the court pointed out that, in a case such as this, apart from claims such as fraud, lack of jurisdiction, or unconstitutionality, "the determination of the Attorney General is essentially unreviewable." *Id.* at 944 (footnote omitted).

5. Thereafter, on March 11, 1987, the BIA dismissed the INS's appeal of the immigration judge's September 19, 1986, order, and denied an INS motion to supplement the record. The Commissioner of the INS sought review by Attorney General Meese pursuant to 8 C.F.R. § 3.1(h)(1)(iii). The Attorney General granted the INS's request for review and allowed respondent and the INS to submit additional evidence and memoranda.

On December 3, 1987, while the issue of respondent's deportation to Ireland was pending before Attorney General Meese, respondent moved to reopen his deportation proceedings pursuant to 8 C.F.R. §§ 3.2, 3.8, and 242.22, to apply for asylum and withholding of deportation, and to change his designated country of deportation. Motion of Respondent to Reopen or to Reconsider, at 1, *Matter of Doherty*, No. A26 185 231 (BIA Dec. 3, 1987). Respondent claimed that his motion was prompted by a change in Irish law. In the opinion of respondent's counsel, the Extradition (European Convention on the Suppression of Terrorism) Act [hereinafter "Extradition Act"], which went into effect in Ireland on December 1, 1987, would allow respondent's extradition from Ireland to the United Kingdom.[6]

6. On June 9, 1988, Attorney General Meese disapproved the BIA's decision, ruled that the INS had shown

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[6] *See* Pike Affidavit, *supra* note 2, at paras. 25-28; *see also* European Convention on the Suppression of Terrorism, 1977, Europ. T.S. No. 90.

that respondent's deportation to Ireland would be prejudicial to the interests of the United States, and ordered respondent deported to the United Kingdom. *Matter of Doherty*, Mem. Att'y Gen. (June 9, 1988). The Attorney General rested his decision on two separate considerations: first, that respondent's deportation to the United Kingdom would serve the policy of the United States that those who commit violent acts against a democratic state should be promptly and lawfully punished and, second, that the Department of State had shown that respondent's deportation to Ireland rather than to the United Kingdom would be detrimental to the United States' foreign policy interests.[7] Respondent's motion to reopen also was considered in the Attorney General's June 9, 1988, ruling; the motion was remanded to the BIA. *Matter of Doherty*, Mem. Att'y Gen. (June 9, 1988).

7. On November 14, 1988, five months after Attorney General Meese's order, the BIA granted respondent's motion to reopen by a 3-2 vote. *Matter of Doherty*, No. A26 185 231 (BIA Nov. 14, 1988). The BIA majority acknowledged that there is "no absolute right to withdraw a prior designation of a country of deportation." *Id.*, slip op. at 5. However, the BIA found that at the time of his hearing before the immigration judge, respondent had "the reasonable expectation . . . that he would be deported to Eire" and that "the likelihood of his being deported to the United Kingdom appeared remote." *Id.* at 6. "Given the state of the law at that time, the respondent could not have been expected to anticipate that he would not be deported to his country of choice. The respondent's failure to file for asylum under these circumstances is excusable." *Id.*

[7] Respondent has appealed the Attorney General's June 9, 1988, ruling to the Second Circuit. *Doherty* v. *United States Dep't of Justice*, C.A. 88-4084 (2d Cir. filed June 21, 1988). The parties have agreed to suspend any action on that appeal pending the outcome of this appeal by the INS.

The BIA also held that "the Attorney General's decision of June 1988 disallowing the respondent's choice of a country of deportation constitutes changed circumstances which have arisen since the hearing." *Id.* Additionally, respondent had "submitted recently published background evidence which we find to be material to the respondent's case." *Id.* The BIA majority provided no analysis of this evidence to support its conclusion.

Finally, the BIA majority held that respondent's evidence established a prima facie claim of a well-founded fear of persecution. It noted that the INS would have the opportunity to prove that respondent had engaged in conduct which rendered him either ineligible for withholding of deportation or unfit for asylum, and concluded that the motion to reopen should be granted. *Id.*

8. The INS appealed the decision of the BIA to me on December 5, 1988.

II.

The Attorney General has retained the authority to review final decisions of the BIA, 8 C.F.R. § 3.1(h), and he may do so either on his own initiative or upon request. *Id.* § 3.1(h)1(i)-(iii). The relief sought by respondent – reopening of proceedings – is wholly discretionary. The BIA has promulgated regulations governing its consideration of motions to reopen proceedings. *See* 8 C.F.R. §§ 3.2, 3.8, and *infra* note 17. These regulations, however, apply only to the BIA, not to the Attorney General, although of course the Attorney General may refer to these regulations when considering a motion to reopen. The Attorney General's decision is *de novo*; he is not confined to reviewing for error. His decision is final, *see Matter of Doherty*, Mem. Att'y Gen. at 4 (June 9, 1988), subject only to judicial review for "abuse of discretion."[8] This is the

[8] *See INS* v. *Rios-Pineda*, 471 U.S. 444, 449 (1985); *INS* v. *Jong Ha Wang*, 450 U.S. 139, 144 (1981); *Bahramnia* v. *INS*, 782 F.2d 1243,

backdrop against which I consider respondent's motion to reopen.

Respondent relies upon three separate grounds in arguing for reopening of his deportation proceedings.[9] First, in

1246 & n.15 (5th Cir.), *cert. denied*, 107 S. Ct. 398 (1986); *Garcia-Mir* v. *Smith*, 766 F.2d 1478, 1490 & n.16 (5th Cir. 1985); *Muigai* v. *INS*, 682 F.2d 334, 337 (2d Cir. 1982); *Scheiber* v. *INS*, 461 F.2d 1078, 1079 (2d Cir. 1972); *Wong Wing Hang* v. *INS*, 360 F.2d 715, 718-719 (2d Cir. 1966).

[9] Respondent seeks reopening so that he can request asylum and withholding of deportation. Asylum is discretionary with the Attorney General. *INS* v. *Stevic*, 467 U.S. 407, 423 n.18, 426 (1984); *INS* v. *Cardoza-Fonseca*, 107 S. Ct. 1207, 1219-20 (1987). To be eligible for asylum, the alien must demonstrate that he is a "refugee." 8 U.S.C. § 1101(a)(42)(A). He must show that he is unable or unwilling to return to his country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, group membership, or political opinion—a standard that is lower than the "clear probability" standard in withholding of deportation cases, and that does not require a showing that persecution is more likely than not. *INS* v. *Cardoza-Fonseca*, 107 S. Ct. at 1213, 1222 & n.31; *Ipina* v. *INS*, 868 F.2d 511, 513-14 & n.6 (1st Cir. 1989). The BIA has held that "an applicant for asylum establishes a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution." *Matter of Barrera*, Interim Dec. 3093, slip op. at 12 (BIA Jan. 5, 1989).

Asylum requests made after the institution of deportation proceedings shall also be considered as requests for withholding of exclusion or deportation. 8 C.F.R. § 208.3(b); *Matter of Martinez-Romero*, 18 I. & N. Dec. 75, 77 n.6 (1981), *aff'd*, *Martinez-Romero* v. *INS*, 692 F.2d 595 (9th Cir. 1982).

An alien seeking withholding of deportation from any country must show that his "life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1253(h)(1). Withholding of deportation is nondiscretionary. It must be granted if the Attorney General finds that the alien would be threatened for any of the five reasons listed in the statute. *INS* v. *Stevic*, 467 U.S. at 421 n.15, 426; *INS* v. *Cardoza-Fonseca*, 107 S. Ct. at 1212. The burden is

relying upon the BIA opinion, he claims that Attorney General Meese's order that he be deported to the United Kingdom because deportation to Ireland would be prejudicial to the interests of the United States, *see id.* at 7-9, was an unforeseen, adverse administrative decision, constituting a "new fact."[10] Second, he claims that, after he admitted deportability and withdrew his claims for asylum and withholding of deportation, there was a change in Irish law as a consequence of the December 1, 1987 implementation of the Extradition Act in Ireland. Specifically, he contends that, if deported to Ireland, the provisions of the Extradition Act would result in his "certain" extradition to the United Kingdom.[11] He argues that had he known of this subsequent development he might have made different decisions at his deportation proceedings.

As a third ground for reopening, respondent claims that there is new and material evidence bearing on his deportability that should now be considered. The asserted new evidence consists of (1) a 1988 report by Amnesty International on the British security forces' treatment of suspected IRA members, and other supporting documents; (2) an affidavit from his mother, relating chiefly to the experiences of her family and other republican sympathizers with the

on the alien to establish a "clear probability" of persecution on any one of the statutory grounds. *INS* v. *Stevic*, 467 U.S. at 430; *Ipina* v. *INS*, 868 F.2d at 515.

[10] Respondent does not make this argument in terms. However, the BIA specifically granted the motion to reopen on the ground that Attorney General Meese's order was, in effect, new evidence. For this reason, I address the argument here.

[11] *See* Brief for Respondent-Appellee to the Attorney General at 14 (April 26, 1989) [hereinafter "Respondent's Brief"].

British security forces;[12] and (3) affidavits from respondent's counsel.[13]

I do not believe that any of these three arguments justifies reopening respondent's deportation proceedings and, accordingly, I deny the motion.

As to the arguments relied upon by respondent in support of the motion, first, throughout these proceedings, respondent knew that the Attorney General might deny his designation of Ireland as the country to which he would be deported. This authority is expressly reserved to the Attorney General by statute, 8 U.S.C. § 1253(a), and the INS consistently took the position that it would oppose respondent's deportation to any country other than the United Kingdom. It also informed respondent that his deportation to the United Kingdom was a matter of interest at the highest levels of the federal government. It is clear from the record that respondent made the conscious decision that he would rather be exposed to the risk that the Attorney General would deny his deportation to Ireland than to the risk of extradition directly to the United Kingdom by the United States under the Supplementary Treaty, then in the final stages of ratification.

It is unlikely that the Attorney General's decision to avail himself of his recognized authority to reject a deportee's designation can ever constitute new evidence. It certainly cannot properly be considered new evidence where, as here, deportation to the country designated by the alien has been vigorously contested throughout the proceedings by the federal Government; it has been represented that there is interest at the highest levels of

[12] *See* Affidavit of Mary (Maureen) Doherty, sworn to Dec. 2, 1987 [hereinafter "M. Doherty Affidavit"].

[13] *See* Pike Affidavit, *supra* note 2; Supplemental Affidavit of Mary Boresz Pike, sworn to Aug. 9, 1988 [hereinafter "Pike Supplemental Affidavit"].

the Government that the alien not be deported to the country designated; and the Attorney General ultimately concludes that the national interests should prevail. Appeal to the Attorney General and decision consistent with the interests of the United States under such circumstances should reasonably be expected. *See* discussion *infra* at [65a-67a.]

Second, on the assumption that the implementation of the Extradition Act represented a change in law, it did not change the rules of decision applied by the immigration officials or Attorney General Meese. If the implementation of the Extradition Act represents a change in fact, it is an immaterial change. The Extradition Act gave effect in Irish law to the provisions of the European Convention on the Suppression of Terrorism [hereinafter "European Convention"], to which the United Kingdom is also a party. The Irish Government expressed its intention to sign the European Convention in November 1985, and did in fact sign it in February 1986. Accordingly, respondent knew or should have known well before December 1, 1987 that Ireland had endorsed the provisions of the European Convention. Furthermore, respondent was subject to extradition to the United Kingdom from Ireland even before Ireland became a party to the European Convention. Thus, Ireland's subsequent adoption and implementation of the Extradition Act did not in itself create a risk of extradition; nor did it materially increase the risk that respondent would be extradited to the United Kingdom. *See* discussion *infra* at [67a-73a.]

Third, much of the "new" factual evidence proffered by respondent is not new at all; it was available at the time of the earlier proceedings, and respondent offers no reason for his failure to present it at that time. The evidence that was not available is not material; for the most part, it is cumulative of evidence presented in the earlier pro-

ceedings. It does not support existence of a threat different in character from that known at the time of the deportation proceedings. *See* discussion *infra* at [74a-78a.].

Thus, none of the grounds offered for reopening respondent's deportation proceedings is sufficient to warrant reopening.

In addition to finding the arguments advanced in support of reopening insufficient, I would, in the exercise of my discretion and as an independent basis for decision, deny the motion to reopen on the ground that respondent explicitly waived his claims to asylum and withholding of deportation as part of a calculated plan to ensure immediate deportation to Ireland before the United Kingdom ratified its treaty with the United States, which would have allowed respondent to be extradited directly to the United Kingdom. *See* discussion *infra* Part IV.[14] The integrity of the administrative process dictates that a deportee who, with the advice and assistance of counsel, makes such deliberate tactical decisions, not be permitted to disown those decisions merely because they ultimately result in action adverse to his interests. This is especially the case where the possibility of that action was not only foreseeable but foreseen.

Finally, I also deny respondent's motion to reopen on the unrelated ground that respondent would not ultimately be entitled to either asylum, the discretionary relief he

[14] *See, e.g., Communication Workers of America, Local 5008* v. *NLRB*, 784 F.2d 847, 851 (7th Cir. 1986) (court must sustain administrative decision if any of the independent grounds that support the decision is correct).

seeks, or withholding of deportation, the nondiscretionary relief he seeks. *See* discussion *infra* Part V.[15]

Respondent simply has not carried the heavy burden of showing either that he is entitled to reopen his deportation proceedings or that, as a matter of discretion, he should be allowed to do so. The record reveals clearly that respondent made deliberate, well-informed, tactical decisions throughout the proceedings to ensure deportation, if at all, to the country of his choice; that he recognized and knowingly assumed the risks that attended each decision; and that all that has happened is that the risks he recognized have in fact materialized. That which the Supreme Court said in the context of a similar attempt to rescind a litigating decision in an immigration proceeding is applicable to respondent:

> [h]is choice was a risk, but calculated and deliberate and such as follows a free choice. [Respondent] cannot be relieved of such a choice because hindsight seems to indicate to him that his decision . . . was probably wrong . . . . There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.

Ackermann v. *United States*, 340 U.S. 193, 198 (1960).[16]

[15] *See supra* note 14.

[16] *See also Ballenilla-Gonzalez* v. *INS*, 546 F.2d 515, 520 (2d Cir. 1976) (alien's waiver of claimed right to counsel was binding, despite her mistaken impression of the law; denial of motion to rehear upheld), *cert. denied*, 434 U.S. 819 (1977); *Small* v. *INS*, 438 F.2d 1125, 1128 (2d Cir. 1971) (alien's waiver through counsel of right to present further evidence at new hearing was binding; deportation order affirmed); *La Franca* v. *INS*, 413 F.2d 686, 690 (2d Cir. 1969) (no reason to reopen proceeding to permit alien to try to establish eligibility for voluntary deportation where alien's counsel had previously waived request for hearing on voluntary departure); *Matter*

III.

I turn first to the claims that respondent should be permitted to reopen his deportation proceedings because of (1) the unexpected, adverse decision of Attorney General Meese ordering him deported to the United Kingdom, (2) the supervening implementation in Ireland of the Extradition Act, *see* Respondent's Brief, *supra* note 11, at 14; Pike Affidavit, *supra* note 2, at paras. 24-28, and (3) the affidavits, book and report submitted by respondent. These events are portrayed as "new facts" warranting a reopening of proceedings. The BIA held that Attorney General Meese's order justified reopening and permitting respondent to withdraw his prior waivers of claims to asylum and withholding of deportation. *See* Respondent's Brief, *supra* note 11, at 9 & n.5. Respondent raised, but the BIA was not required to decide, the question of the effect of the Extradition Act because of its holding that Attorney General Meese's order was alone sufficient grounds upon which to reopen. *See Matter of Doherty*, No. A26 185 231, slip op. at 5-6 (BIA Nov. 14, 1988). The BIA suggested, but did not explicitly hold, that the affidavits and books would be sufficient to justify reopening. *Id.* at 6.

Deportation proceedings may be reopened by the BIA on the basis of new evidence if the evidence "is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 3.2.[17] A

of M-, 5 I. & N. Dec. 472, 474 (1953) (counsel's decision not to file application for suspension of deportation during pendency of deportation hearing was analogous to error of judgment in conduct of defense, since filing became untimely; denial of motion to reopen would not violate due process; motion was granted "purely as a matter of grace").

[17] "Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material." 8 C.F.R. § 3.8. "Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that

motion to the BIA to reopen a deportation proceeding on the basis of previously unavailable evidence is "appropriate[ly] analog[ized]" to "a motion for a new trial in a criminal case on the basis of newly discovered evidence, as to which courts have uniformly held that the moving party bears a heavy burden." *INS* v. *Abudu*, 108 S. Ct. 904, 914 (1988). Motions to reopen deportation proceedings on this ground are plainly "disfavored," *id.* at 913,[18] for reasons "comparable to those that apply to petitions for rehearing, and to motions for new trials on the basis of newly discovered evidence." *Id.* (footnotes omitted).[19] Generally, a motion to reopen on the grounds of new evidence will

evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." *Id.* § 3.2.

Similarly, a motion to the immigration judge for reopening pursuant to 8 C.F.R. § 242.22 "will not be granted unless the immigration judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing." Except as otherwise provided, a motion to reopen under 8 C.F.R. § 242.22 "shall be subject to the requirements of section 103.5," which states in part that "[a] motion to reopen shall state the new facts to be proved at the reopened proceeding and shall be supported by affidavits or other evidentiary material." 8 C.F.R. § 103.5(a). A motion to reopen pursuant to 8 C.F.R. § 208.11 on the basis of an asylum request "must reasonably explain the failure to request asylum prior to the completion of the . . . deportation proceeding." *See also Ghosh* v. *Attorney General*, 629 F.2d 987, 989 (4th Cir. 1980); *Matter of Haim*, Interim Dec. 3060, slip op. at 3 (BIA April 11, 1988); *Matter of Lam*, 14 I. & N. Dec. 98, 99 (1972).

[18] *See also INS* v. *Jong Ha Wang*, 450 U.S. 139, 143 n.5 (1981) (regulatory language disfavors reopening).

[19] Failure to introduce previously available, material evidence, 8 C.F.R. § 3.2 (or, in an asylum application case, failure to reasonably explain the failure to apply for asylum initially, *id.* 208.11), is an independent ground on which the BIA may deny a motion to reopen. *INS* v. *Abudu*, 108 S. Ct. at 911.

not prevail unless the profferred evidence is such that it probably would change the outcome of the prior proceeding.[20]

While the BIA standards apply only to the BIA, not to the Attorney General, I refer to them in my consideration of the arguments made for reopening in this part because I believe they embody neutral inquiries that go directly to the issue of the applicant's justification for asking for, and the administrative system's justification for allowing, the reopening of proceedings previously closed.

Under these standards, I do not believe that either Attorney General Meese's decision or the implementation of the Extradition Act warrants reopening of respondent's deportation proceedings. Neither constitutes previously unobtainable material evidence as required by the regulations, *see* 8 C.F.R. §§ 3.2, 3.8, 242.22, nor a reasonable justification for permitting respondent to withdraw his waiver of his claim for asylum. *Id.* at 208.11.[21]

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[20] *See United States* v. *Agurs*, 427 U.S. 97, 111 & n.19 (1976) (standard is generally applied on motions for new criminal trials); *Philip* v. *Mayer, Rothkopf Industries, Inc.*, 635 F.2d 1056, 1063 (2d Cir. 1980) (no new trial in civil case where movant's post-trial evidence would not "change our result here"); *United States* v. *Slutsky*, 514 F.2d 1222, 1225 (2d Cir. 1975) (post-trial evidence must be "so material that it would probably produce a different verdict"); *United States* v. *On Lee*, 201 F.2d 722, 724 (2d Cir.) (same), *cert. denied*, 345 U.S. 936 (1963).

[21] It is unnecessary for me to address (and I do not) the question whether respondent has established a prima facie case for the substantive relief sought. The Attorney General may decide not to reopen a deportation proceedings, even if the movant establishes a prima facie case for granting asylum or withholding of deportation. *See INS* v. *Abudu*, 108 S. Ct. at 912-13 (holding that motion to reopen may be denied in an asylum case if alien fails reasonably to explain failure to file asylum claim initially, and stating that "the BIA has discretion to deny a motion to reopen even if the alien has made out a prima facie case for relief" and that "in a given case, the BIA may determine . . . as a sufficient ground for denying relief . . . whether the alien has produced previously unavailable, material evidence (§ 3.2)"); *see also INS* v. *Rios-Pineda*, 471 U.S. at 449 ("even assuming that respondents' motion to reopen made out a prima facie case of eligibility for suspension of deportation, the Attorney General had discretion to deny the motion to reopen"); *INS* v. *Jong Ha Wang*, 450 U.S. at 139, 144 n.5 (8 C.F.R. § 3.8 "does not affirmatively require the Board to reopen the proceedings under any particular condition"); *Bahramnia* v. *INS*, 782 F.2d at 1249; *Yousif* v. *INS*, 794 F.2d 236, 241 (6th Cir. 1986); *Ahwazi* v. *INS*, 751 F.2d 1120, 1122 (9th Cir. 1985); *Matter of A- G-*, Interim Dec. 3040, slip op. at 3 (BIA Dec. 28, 1987); *Matter of Barocio*, Interim Dec. 2992 (BIA Aug. 8, 1985).

1. Attorney General Meese's June 9 order cannot properly be considered a "new fact." While the actual fact of the order is in some sense "new," the possibility that the Attorney General would refuse to accept respondent's designation of Ireland as the country to which he wanted to be deported was known, or should have been known, throughout the proceedings.

The authority of the Attorney General, in his discretion, to deny deportation to the country designated by an alien is plain on the face of the same statute that gives the alien the right to designate the country to which he wishes to be deported:

> The deportation of an alien in the United States provided for in this chapter, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, *unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States.*

8 U.S.C. § 1253(a) (emphasis added). Given this explicit reservation of authority and its appearance in the very

same sentence that accorded respondent the right to designate Ireland his country of deportation, it is inconceivable that anyone represented by counsel could not know that there always existed a risk that the Attorney General would deny respondent's deportation to Ireland to protect the interests of the United States.

Even if the possibility of denial by the Attorney General were not so clear from the face of the statute alone, it should have been evident from the position taken by the Government from the outset of the proceedings. At the September 12, 1986, hearing at which respondent designated Ireland as his country of deportation, counsel for the INS objected to that designation, and stated that the INS would take the position that deportation to any country other than the United Kingdom would be prejudicial to the interests of the United States. Transcript of Sept. 12 Hearing, *supra* note 2, at 41-43, 47-48. The INS even represented that there was interest at the highest levels of the federal government in having respondent deported to the United Kingdom. *Id.* at 47 ("this matter is of some concern at the highest levels of government and . . . was under consideration by the legal advisor to the State Department and will be under the personal review of Attorney General Meiss [sic] this coming week.").

Given these representations by the INS, respondent clearly should have understood, if he did not, that "[a]fter the BIA determination, the case might ultimately be referred to the Attorney General at his request, at the request of the Chairman or a majority of the BIA, or at the request of the Commissioner of the INS." *Doherty* v. *Meese*, 808 F.2d at 942. Contrary to the conclusion of the BIA, *Matter of Doherty*, No. A26 185 231, slip op. at 6 (BIA Nov. 14, 1988), once this possibility was acknowledged, respondent reasonably should have known

(again, if he did not) that the Attorney General ultimately might forbid deportation to Ireland. The ultimate decision in an administrative process cannot itself constitute "new" evidence to justify reopening. If an adverse decision were sufficient, there could never be finality in the process.

2. Respondent also characterizes Ireland's implementation of the Extradition Act, and specifically the provisions permitting extradition to the United Kingdom, as a supervening change requiring reopening of the proceedings. He terms this asserted change "the watershed event," Respondent's Brief, *supra* note 11, at 11-12, "the gravamen of [his] motion to reopen," *id.* at 14, and "[t]he event warranting the motion," Pike Affidavit, *supra* note 2, at para. 5.[22] For the reasons below, I do not believe that implementation of the Extradition Act was a "new fact." Moreover, even assuming that it was new and did represent a change in Irish law, it is irrelevant, given that Attorney General Meese ordered respondent deported to the United Kingdom not Ireland.

It is plain that implementation of the Extradition Act was not a "new" fact. In the Anglo-Irish Agreement entered into at Hillsborough, Northern Ireland on November 15, 1985, the Irish Government expressed its intention "to accede as soon as possible to the European Convention on the suppression of terrorism." Anglo-Irish Agreement, Nov. 15, 1985, Ireland–United Kingdom, 24 I.L.M. 1579, 1581 (1985). Ireland signed the European

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[22] At one time, respondent suggested that the change in Irish law was the sole cause of his motion. *See* Reply Brief of Respondent-Appellee to Opposition to Respondent's Motion to Reopen or To Reconsider at 6 (April 22, 1988) ("The cause of [respondent's motion's] December 3, 1987, filing was the implementation on December 1, 1987, of the Extradition Act. No grounds for its filing existed until December 1, 1987; respondent can hardly be faulted for not having filed it prior to that date.") (footnote omitted).

Convention on February 24, 1986, *see, e.g., Ireland Signs Terrorism Convention*, Fin. Times, Feb. 25, 1986, § 1, at 4, col. 4, more than six months *before* respondent withdrew his applications for asylum and for withholding of deportation and conceded deportability. *See* discussion *supra* at [49a-50a.] Both the November 1985 Anglo-Irish Agreement and Ireland's February 1986 signing of the European Convention were widely publicized. *See, e.g., Fitzgerald Discusses Anglo-Irish Pact, U.S. Aid,* Ir. Echo, March 22, 1986, at 6, col. 1; Holland, *Ireland to Sign Anti-Terrorist Convention,* Ir. Echo, March 1, 1986, at 2, col. 1; *Complete Text of Anglo-Irish Agreement on Ulster*, The Times (London), Nov. 16, 1985, at 4, col. 1. Respondent, having expressly based his designation on a counseled understanding of Irish extradition laws, is properly chargeable with knowledge of Ireland's signing of the European Convention.

The Extradition Act, which gave effect in Irish law to the European Convention and amended the Extradition Act of 1965, was passed on January 21, 1987. Extradition (European Convention on the Suppression of Terrorism) Act, No. 1 (1987). Section 13 of the Extradition Act provided that its implementation was suspended until December 1, 1987, subject to the condition that resolutions of both Houses of the Irish Parliament could bring it into force at an earlier date or provide for further postponement. *Id.* § 13.[23] In sum, "the watershed event" upon which respondent relies was neither sudden nor unforeseeable. Instead, it was the logical culmination of a

[23] Pursuant to Section 13, the Extradition Act was automatically implemented on December 1, 1987. Acceleration or postponement of the implementation date, however, would not have affected the Extradition Act's applicability to respondent. By its terms, the Extradition Act applies to offenses committed or alleged to have been committed "before or after" the date of passage, January 21, 1987. *Id.* § 1(4).

lawmaking process that had been set in motion more than two years prior to December 1, 1987.

Even were the fact of the Extradition Act "new," it would not justify reopening of the deportation proceedings. A supervening change in the law does not generally constitute a reason for granting a new trial or for amending a judgment, even if the litigant has abandoned a claim or defense that might be meritorious in light of the change.[24] And, as noted, a change in law that would not constitute grounds for a new trial ordinarily does not justify reopening deportation proceedings. *INS* v. *Abudu*, 108 S. Ct. at 913-14. Some courts have held that an exception to this general rule against new trial exists where the change in law would affect the rule pursuant to which the prior decision was made. *See, e.g., United States* v. *Bank of America National Trust & Savings Association*, 51 F. Supp. 751, 751 (N.D. Cal. 1943). *But see McMann* v. *Richardson*, 397 U.S. 759, 774 (1970). Here, however, the Extradition Act did not alter the rules of decision applied by the immigration judge or the Attorney General in either the Section 1253 proceedings or the asylum and withholding of deportation proceedings. As to the former, the immigration judge and Attorney General Meese ordered respondent deported to Ireland and the United Kingdom, respectively, based upon their assessments of the foreign policy interests of the United States. The interests of the United States, and the compatibility of deporting respondent to either country with those interests, are the same now as they were prior to the implementation of the Extradition Act. As to the latter, the Extradition Act could not have and did not change the

[24] *See* Fed. R. Civ. P. 59(a); *Del Rio Distributing, Inc.* v. *Adolph Coors Co.*, 589 F.2d 176, 178-79 (5th Cir.), *cert. denied*, 444 U.S. 840 (1979).

standards that apply to respondent's asylum and withholding of deportation claims under the statutes of the United States. Accordingly, any change in law wrought by the Extradition Act does not call into question the legal correctness of the decisions that were made by either the immigration officials or Attorney General Meese.

Respondent presumably would argue that, if not a change in law, the implementation of the Extradition Act must represent a change in fact justifying reopening of the proceedings because the Extradition Act expressly provides for extradition by Ireland to the United Kingdom. This argument, too, is unpersuasive.

I do not believe that the Extradition Act's provisions, as they relate to respondent, represent a change in fact that would warrant reopening these deportation proceedings. Respondent was extraditable by Ireland to the United Kingdom before the Extradition Act was implemented; he would be extraditable under the Extradition Act. Indeed, respondent himself repeatedly emphasized the serious risk of extradition by Ireland before passage of the Extradition Act in arguing for affirmance of the immigration judge's order that he be deported to Ireland.[25] For example, in his Brief for Respondent-Appellee Joseph Patrick Thomas Doherty at 16 (Dec. 19, 1986), he states, "the Service fails to note that decisions of the Irish Supreme Court are viewed as having vitiated the political offense exception, thereby removing any obstacle to respondent's extradition from Ireland to Northern Ireland. *See, e.g, McGlinchey*

[25] *See* Doherty Petition, *supra* note 2, at paras. 53-54; Brief for Respondent-Appellee Joseph Patrick Thomas Doherty at 16 (Dec. 19, 1986); Reply of Respondent to Opposition of the INS to Respondent's Motion for Summary Dismissal at 7 n.5 (Oct. 27, 1986); Brief for Appellant John Patrick Thomas Doherty at 14 (Oct. 2, 1986).

v. Wren, 3 Ir. L. Rep. Monthly 169 (1982)." In the Doherty Petition, *supra* note 2, at paras. 53-54, respondent's attorney, Stephen Somerstein, stated:

> The Republic of Ireland . . . has extradition arrangements with the United Kingdom and has recently extradited to Northern Ireland individuals who had raised the political offense exception as a defense to their extradition, but were found by the Irish courts to be non-political offenders. Upon his deportation to Ireland, Mr. Doherty is subject to extradition from Ireland to Northern Ireland pursuant to a request therefor by the English government. His case will be considered by the courts of the Republic of Ireland pursuant to the well established law of that country in an historical context but best understood by the Irish and British themselves.

The only difference since implementation of the Extradition Act appears to be that extradition is now expressly provided for by statute, whereas previously extradition was simply ordered on the basis of less formal "extradition arrangements" between the United Kingdom and Ireland. *See* Doherty Petition, *supra* note 2, at para. 53. Given that respondent faced a serious risk of extradition by the United Kingdom before implementation of the Extradition Act, it cannot be said that the mere express provision for extradition in the statute constitutes new evidence.

Respondent claims that the Extradition Act transformed "the possibility of [his] removal from Ireland to the United Kingdom . . . into a certainty." *See* Respondent's Brief, *supra* note 11, at 14. Respondent's effort to minimize the risk of deportation by Ireland before implementation of the Extradition Act contradicts the statements that he made before the BIA in defense of the immigration judge's order deporting him to Ireland. *See* discussion *supra* note 25.

Furthermore, it is unsupported by the provisions of the Extradition Act itself which, incorporating the terms of the European Convention, provide for denial of extradition where

> there are substantial grounds for believing that –
>
> (ii) the warrant was in fact issued for the purpose of prosecuting or punishing [the person named] on account of his race, religion, nationality or political opinion or that his position would be prejudiced for any of these reasons.

Extradition (European Convention on the Suppression of Terrorism) Act, No. 1, § 8 (1987); *see also id.* § 9. Thus, existing Irish law explicitly preserves for respondent the right to raise essentially those claims that he would have relied upon under pre-existing Irish law. Accordingly, if respondent has a meritorious claim that extradition to the United Kingdom by Ireland would result in persecution, he could raise that claim today before Irish officials who, as respondent has previously suggested, *see* discussion *supra* at [70a-71a], would view his claim with greater understanding.[26] The reasonable inference therefore is

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[26] Indeed, there is reason to believe that the Extradition Act has actually enhanced the defenses available to an individual seeking to resist extradition from Ireland to the United Kingdom. Under the Extradition (Amendment) Act, No. 25 (1987), the Attorney General of Ireland is prohibited from endorsing for execution an arrest warrant under the Extradition Act unless he is of the opinion that "there is a clear intention to prosecute or . . . continue the prosecution of, the person named or described in the warrant concerned for the offence specified therein" in the country seeking extradition, and "such intention is founded on the existence of sufficient evidence." *Id.* § 2(1)(a). Furthermore, extradition may also be refused on the grounds that, "by reason of the lapse of time since the commission of the offence . . . or the conviction of the person named . . . and other exceptional circumstances, it would be unjust, oppressive or invidious to deliver him up . . . ." *Id.* § 2(1)(b). At least one recent study indicates that the Extradition Act does not go as far as the Irish Supreme Court has gone in circumscribing the political offense exception. G. Hogan & C. Walker, *Political Violence and the Law in Ireland* 292-93 (1989).

The actual administration of Irish extradition law after the implementation of the Extradition Act also suggests that it is less than certain that respondent would be extradited to the United Kingdom were he deported to Ireland. On December 13, 1988, the Attorney General of Ireland issued a statement rejecting a request by the government of the United Kingdom to extradite the suspected PIRA terrorist Patrick Ryan, whom the British authorities wished to try for alleged terrorist activities, including conspiracy to murder, possession of explosives, and conspiracy to cause explosions. *See, e.g.*, Rule, *Irish Deny British Bid to Extradite Priest Suspected of Aiding I.R.A.*, N.Y. Times, Dec. 14, 1988, § A, at 3, col. 1. In view of the Irish Attorney General's decision not to comply with that extradition request, it seems entirely possible that a request to extradite respondent from Ireland might also be rejected.

that respondent cannot credibly maintain now that the change in Irish law has made his return to the United Kingdom inevitable, and that, as a consequence, he should be permitted to reopen and redesignate a country other than Ireland.[27]

Respondent's argument on the Extradition Act comes down to the fact that he believes that he will be given a more sympathetic hearing on an asylum or withholding of deportation claim in this country than he would receive on a denial of extradition claim in his own country. Absent reason to think that respondent will not receive a fair hearing in his home courts of Ireland, this is simply not a basis for reopening his deportation proceedings.

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[27] Even were I to assume that implementation of the Extradition Act increased the risk that respondent would be extradited to the United Kingdom from Ireland, I would not grant the motion to reopen respondent's proceedings. Any change in the risk of extradition would necessarily be immaterial, given that the risk was "serious" before the implementation of the Extradition Act and is no more than serious (*i.e.*, not certain) today.

I would reject respondent's claim based upon implementation of the Extradition Act on a separate and independent ground: even if I agreed that the Extradition Act was a new fact and constituted a change in Irish law, I believe that any change in Irish law is irrelevant. Attorney General Meese determined that it would be against the interests of the United States to deport respondent to Ireland, and in furtherance of our national interests to deport him to the United Kingdom where he could be promptly punished for the crimes he has committed. Mem. Att'y Gen. at 7-9 (June 9, 1988). Unless I overturn Attorney General Meese's order, which I have no reason to do, a change in Irish law has no effect upon respondent. Respondent cannot be deported to Ireland because of the extant determination that that would be contrary to the interests of the United States, and he cannot claim asylum against deportation to the United Kingdom because he assumed the risk of deportation to the United Kingdom when he designated Ireland. *See* discussion *supra* at [65a-67a.] This is unlike the situation where an alien designates a particular country and there is a subsequent change in the country that increases the likelihood of his persecution in that country. In that circumstance, the alien may be harmed by the change because he is being deported to the country in which the change occurred. Here, in contrast, assuming *arguendo* that there was a change in Irish law, that change cannot affect respondent because he is not going to be deported to Ireland.

3. Respondent also urges reopening on the ground that he is profferring new evidence in the form of affidavits and documents. This evidence is not both material and previously unobtainable. *See* 8 C.F.R. §§ 3.2, 242.22.[28] "When an alien has already had one full deportation hearing, with all the procedural rights accompanying it, . . . he or she may have it reopened only upon a showing of significant new evidence." *Acevedo* v. *INS*, 538 F.2d 918, 920 (2d Cir. 1976) (*per curiam*). Substantially all of the evidence submitted by respondent is either cumulative of that which he has previously presented, discoverable long ago, or not material in light of the evidence that was presented. None of the evidence supports existence of a threat of persecution of which respondent was unaware or a material change in the character of a threat previously recognized.

(a) Respondent proffers certain documents, including a report by Amnesty International, *United Kingdom/ Northern Ireland: Killings by Security Forces and "Supergrass" Trials* (1988) [hereinafter "Amnesty Report"], and a book relied on by Amnesty International in its report, *The Stalker Affair: The Shocking True Story of Six Deaths and a Notorious Cover-Up* (1988), by John Stalker, former Deputy Chief Constable of the Greater Manchester (U.K.) Police Force, which he maintains contain new evidence of the threat he faces by deportation.[29] Both the Amnesty Report and the Stalker book focus on allegations that British security forces have killed or wounded unarmed individuals suspected of membership in republican armed opposition groups, as part of a government policy of eliminating rather than arresting such individuals. The incidents of "particular concern" to Amnesty International were "the killings of six unarmed persons in late 1982." Amnesty Report at 7; *see id.* at 17-25

[28] The BIA provided no analysis to support its conclusory assertion that "respondent has submitted recently published background evidence which we find to be material to the respondent's case." *Matter of Doherty*, No. A26 185 231, slip op. at 6 (BIA Nov. 14, 1988). Nor did Board Member Heilman provide any analysis of these materials in his concurring opinion.

[29] The contents of these documents are summarized by respondent's counsel in the Pike Supplemental Affidavit, *supra* note 13.

(discussing the 1982 events). Information concerning these events was available to respondent well before he brought his motion to reopen, and indeed even before he withdraw his claims for asylum and withholding of deportation in September 1986. *See Matter of Lam*, 12 I. & N. Dec. 696 (1968).[30] Thus, although the Amnesty Report itself first appeared in 1988, respondent could, with due diligence, have presented significant amounts of the information contained in it at a much earlier stage of these proceedings.[31] He offers no reasonable explanation for his failure to do so.

(b) Respondent also proffers an affidavit from his mother, describing her family's dealings with the British security forces, and with Ulster "unionist" elements outside the government.[32] Even accepting as true the recitals

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[30] *Lam* is closely analogous to this case. In *Lam*, the BIA denied a concedely deportable alien's motion to reopen in order to withdraw his designation of Hong Kong as his country of deportation, and to permit him to apply for temporary withholding of his deportation thereto. The alien claimed that he should have been given the opportunity to withdraw his designation because of Communist riots that broke out in Hong Kong in May 1967. He contended that he had fled from mainland China as a refugee from Communism, and that the riots gave rise to a fear that he would be persecuted by the Communists if he were sent to Hong Kong. The BIA denied his motion, in part because his evidence was not previously unobtainable: the movant could have advanced his claim for asylum in a July 1967 hearing, *e.g.*, two months after the riots, but had not done so.

[31] Amnesty International's concerns over the causes of the incidents against Irish republic groups do not bear on the treatment of individuals held in prison for criminal activities. Assuming for the purposes of this motion that British security forces have on occasion sought to kill suspected republican opposition members who were outside their custody, it does not follow that an individual actually in the keeping of British forces would also be exposed to such a threat.

[32] The affidavit's references to the conduct of nongovernmental "unionist" elements relate generally to the unstable conditions in

set forth, the affidavit merely presents evidence that was discoverable earlier. Again, he offers no explanation as to why he did not proffer the evidence during any of the earlier proceedings.[33]

Moreover, the evidence is essentially cumulative of that offered previously. The theme of the affidavit is that a longstanding pattern of conduct by British military and police forces in Northern Ireland, coupled with the violent activities of pro-unionist elements among the Protestant population, indicates the presence of danger to suspected republican sympathizers generally, and particularly to the respondent and his family.[34] This claim, and indeed much of the evidence cited to support it, is substantially the same as that presented by respondent when he first claimed for relief in June 1983; it does not suggest existence of either a new source of persecution or a heightened danger of persecution from an existing source which respondent did not previously apprehend.[35] In fact, substantial portions

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Northern Ireland, but do not substantiate a claim that he would be threatened by persecution at the hands of British *governmental* authorities. *Cf. Matter of A- G-*, Interim Dec. 3040, slip op. at 5-6.

[33] The affidavits of respondent's counsel, *supra* notes 2 and 13, also fail to provide previously unobtainable material evidence. The pertinent facts recited therein are found elsewhere in respondent's submissions or are otherwise matters of record.

[34] The danger indicated, it should be noted, need not be understood as a danger of *persecution*. The lawful use of force by authorized officials which is reasonably aimed at detecting, preventing, or punishing criminal activity does not support a claim of persecution. The affiant's statement does not attempt to distinguish such activity on the part of the British military and police from the other types of conduct she describes.

[35] *See Ganjour* v. *INS*, 796 F.2d 832, 838 (5th Cir. 1986) (application for reopening untimely where based on information from telephone call by alien's sister in Iran predating immigration hearing and appeal); *Young* v. *INS*, 759 F.2d 450, 456-57 (5th Cir.) (affidavit

of Mrs. Doherty's affidavit relate to matters which occurred even before respondent withdrew his claims for asylum and withholding of deportation.[36] Other events of more recent occurrence, although they may comprise information not previously available to respondent, are not sufficiently material to warrant reopening.[37]

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stating that alien's daughter had recently been arrested and interrogated about him by Guatemalan police was cumulative of prior evidence), *cert. denied*, 474 U.S. 996 (1985); *contrast Bernal Garcia* v. *INS*, 852 F.2d 144, 146-47 (5th Cir. 1988) (new evidence consisted of letter received after conclusion of deportation proceedings relating previously unknown death threat made two weeks earlier); *Ananeh-Firempong* v. *INS*, 766 F.2d 621, 626 (1st Cir. 1985) (supporting affidavits described political events "that, in relevant part, had not occurred until after [movant's] earlier deportation proceedings had concluded").

[36] *See* M. Doherty Affidavit, *supra* note 12, at paras. 1-20, 22-23, 25-27, 36-38 (relating information, substantially all of which was available prior to respondent's withdrawal of his claims for asylum and withholding of deportation on September 12, 1986). Thus, for instance, the affiant's accounts of arrest, trial, and acquittal of respondent's sister on a charge of murder in 1983, *see id.* at para. 20, or of subsequent events in 1985 and 1986 involving her da ghter and of the man with whom her daughter lives, *see id.* at paras. 23-28, would appear to have been available to respondent well before his waiver of his asylum claim. Indeed, in his 1983 application for asylum, respondent referred to arrests of his mother, father, and three sisters at various times in the *prior twelve* years, and to the bombing of his family's house *in 1974* by what he described as a "quasi-official Protestant group." *See* Respondent's Application for Political Asylum, signed June 27, 1983. Much of respondent's mother's affidavit simply elaborates on or adds detail to such allegations.

[37] For example, the affiant states that her son-in-law had been arrested about five weeks before she made out her affidavit, and that while he was detained, the police "made abusive remarks to him" about respondent. M. Doherty Affidavit, *supra* note 12, at para. 35. Again, for example, the affiant states that on two unidentifeid occasions on which her daughter was detained by the police, "the interrogators talked about [respondent] and what would be done to him upon his return." *Id.* at para. 24. Such evidence is not different in tenor from the allegations respondent made when originally claiming asylum in 1983. Furthermore, the statements attributed to the security personnel are ambiguous. Bearing in mind that respondent has been convicted of a murder, "abusive" statements about him by the police, or statements about "what would be done to him" if he were returned, do not have to be understood as implied threats of persecution on forbidden grounds.

Other submissions by the affiant concern, for example, the exposure of an alleged conspiracy in September 1987 by nongovernmental "unionist" elements to murder Anthony Hughes, the man with whom affiant's daughter lives. *Id.* at paras. 31-32. Such evidence is not relevant to establishing that the respondent would have a well-founded fear of persecution at the hands of *governmental* authorities, or that they would threaten him with loss of life or freedom for proscribed reasons.

Finally, other parts of affiant's statements, *e.g.*, *id.* at para. 40, are cumulative of evidence submitted elsewhere in this motion.

[38] Again, here, as in Part III *supra*, I need not and do not decide whether respondent can make out a prima facie case for the substantive relief sought. *See supra* note 21.

IV.

I am also exercising my discretion to deny respondent's motion to reopen on the independent ground that he knowingly and intelligently waived any claim that he might have had to asylum and withholding of deportation.

In my judgment, at least in this particular case, the interests in the integrity of the administrative process and finality of decision should prevail over whatever interest respondent has in withdrawal of his calculated waivers because of an unfavorable decision, which was clearly foreseeable at the time.[38]

Respondent expressly conceded deportability and withdrew his claims to asylum and withholding of deportation on September 12, 1986. He did so on the record, through counsel, in response to a direct question from the immigration judge as to whether he intended to waive these

claims. *See* discussion *supra* at [49a-50a]. By any standard, respondent's decision was an intentional relinquishment of any right to claim asylum relief from deportation. *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). Further, it was a knowing waiver. It was calculated in an attempt to avoid extradition directly to the United Kingdom under a treaty between the United States and the United Kingdom soon to be ratified. *See Doherty* v. *Meese*, 808 F.2d at 940. It appeared likely at the time that the United Kingdom would ratify its treaty with the United States, which could have provided for respondent's direct extradition to the United Kingdom, before any decision could be made on asylum or withholding of deportation. Facing imminent ratification of this treaty, respondent chose to leave the United States as quickly as possible, rather than risk direct extradition to the United Kingdom in the event the treaty were ratified. *See id.* (respondent "urgently want[ed]" to escape the effects of the then-pending Supplementary Treaty). When he chose to waive any claims to asylum and withholding of deportation to avoid the possibility of direct extradition to the United Kingdom, he assumed the risk that Attorney General Meese might deny deportation to Ireland; whatever risks to him that existed at the hands of the Irish; and the risk that the move then underway to obtain ratification of Ireland's treaty with the United Kingdom would prove successful.

This tactical decision by respondent was fully within his rights. However, when he made this decision, he assumed the risk that he would be denied his request to be deported to Ireland, and required to go elsewhere. *See* discussion *supra* at [65a-67a]. The fact that respondent's attempt to work the regulatory process to his advantage failed, should not, absent exceptional circumstances, relieve him of the consequences of the decisions made in the attempt

to work the process to his advantage.[39] The Supreme Court has observed that courts "cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him. However unwise the first choice may have been, the range of waiver is wide." *Johnson* v. *United States*, 318 U.S. 189, 201 (1943).[40] So here, respondent's tactical decisions should not be revocable merely because later events did not unfold as he wished. If we were not to give near-preclusive effect to an express waiver under circumstances such as exist here, the regulatory process could be manipulated at will by litigants making and withdrawing waivers *ad libitum*, at the expense of the fair and expeditious administration of meritorious deportation claims.

V.

I also deny the motion on the separate grounds that respondent would not ultimately be entitled either to the discretionary relief of asylum or to withholding of deportation.

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[39] Respondent's concession of deportability and withdrawal of any claim to relief is analogous to a guilty plea. "[W]hen the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary." *United States* v. *Broce*, 109 S. Ct. 757, 762 (1989). *See also Brady* v. *United States*, 397 U.S. 742, 757 (1970) ("A defendant is not entitled to withdraw his plea [of guilt] merely because he discovers long after [it] has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action.").

[40] *See also United States* v. *Prince*, 533 F.2d 205 (5th Cir. 1976) (antitrust defendants not permitted to withdraw *nolo contendere* pleas, made after consulting counsel, when sentences proved harsher than expected).

1. I deny the motion to reopen to permit the claim of asylum because, in my view, respondent would not ultimately be entitled to this discretionary relief, *INS* v. *Abudu*, 108 S. Ct. at 912, even if he could now establish a prima facie case for such relief.[41]

The grant of asylum is discretionary with the Attorney General.[42] In my discretion, I would not grant the respondent asylum. First, it is "the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment." *Matter of Doherty*, Mem. Att'y Gen. at 7 (June 9, 1988). Deporting respondent to the United Kingdom would unquestionably advance this important policy. *See id.* at 6-7. Second, the United States Government, through the State Department, has specifically determined that it is in the foreign policy interests of this country that respondent be deported to the United Kingdom. *Id.* at 7-8. Third, respondent knowingly and intentionally waived his claim to asylum, and for the reasons explained in Part IV, *supra*, I would not permit withdrawal of that waiver. Fourth, I believe that respondent's membership in and assistance of the PIRA in its acts of persecution, and the nature and number of his criminal acts in general, *see* discussion *supra* at [46a-48a], suggest that he is not deserving of equitable relief.

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[41] Insofar as respondent also requests reopening to enable him to seek the nondiscretionary relief of withholding of deportation, I conclude, for the reasons set fourth *infra* at [83a-91a], that respondent is statutorily ineligible for that relief.

[42] *See INS* v. *Stevic*, 467 U.S. at 421 n.15, 426; *INS* v. *Cardoza-Fonseca*, 107 S. Ct. at 1219-20. The discretionary authority of the Attorney General is not restricted to the enumerated grounds which compel an INS district director to deny asylum. 8 C.F.R. § 208.8(f)(i)-(vi).

2. I also deny the motion for reopening to permit respondent to raise a withholding of deportation claim. Even assuming that respondent could sustain an argument that, upon deportation, his "life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion" within the meaning of 8 U.S.C. § 1253(h)(1), he would be ineligible, on two separate grounds, for nondiscretionary withholding of deportation under 8 U.S.C. § 1253(h)(2)(A), (C).

(a) Subsection 1253(h)(2)(C) provides that the prohibition on deportation in § 1253(h)(1) is inapplicable where "there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States." [43] By its terms, this subsection does not require the Attorney General to find that an alien has actually committed a serious nonpolitical crime, but merely to find that there are serious reasons for *considering* that an alien has committed such a crime. *See McMullen* v. *INS*, 788 F.2d at 596-99. In conferring this latitude on the Attorney General, the statute recognizes that cases involving alleged political crimes arise in myriad circumstances, and that what constitutes a "serious nonpolitical crime" is not susceptible of rigid definition. As one commentator has observed, "[i]n practice, characterization of an offence as 'political' is left to the authorities of the state," and "the

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[43] This subsection, which was added to the Immigration and Nationality Act as part of the Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 102, 107 (1981), is based directly upon, and is intended to be construed consistent with, the United Nations Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267 (1967), which incorporates by reference the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (1951). *See McMullen* v. *INS*, 788 F.2d 591, 594-95 (9th Cir. 1986).

function of characterization itself is . . . one in which political considerations will be involved." G. Goodwin-Gill, *The Refugee in International Law* 35 (1983).

In *McMullen* v. *INS*, 788 F.2d 591 (9th Cir. 1986), the court set forth an analytical framework for determining whether an alien has committed a "serious nonpolitical crime" within the meaning of section 1253(h)(2)(C). There must be a " 'close and direct causal link between the crime committed and its alleged political purpose and object.' " *Id.* at 597 (*quoting* G. Goodwin-Gill, *supra*, at 61). Additionally, the crime "should be considered a serious nonpolitical crime if the act is disproportionate to the objective, or it is 'of an atrocious or barbarous character.' " *Id.* at 595 (*quoting* G. Goodwin-Gill, *supra*, at 61). Both strands of this suggested analysis are satisfied here.[44]

It is the official position of the United States Government that the PIRA is a terrorist organization. United States Dep't of State, *Patterns of Global Terrorism: 1988* 33-34, 74-75 (1989) (identifying the PIRA as a terrorist organization);[45] *see also McMullen* v. *INS*, 788 F.2d at

[44] That respondent's extradition was denied on the grounds that the crime for which extradition was sought was a political offense under the Extradition Treaty then in force, *see Matter of Doherty by Gov't of United Kingdom*, 599 F. Supp. 270, has no bearing on the instant inquiry, which is a matter of statutory interpretation of 8 U.S.C. § 1253(h)(2)(C). *See McMullen* v. *INS*, 788 F.2d at 596-97.

[45] *See also* 20 Presidential Documents 775 (1984) (PIRA "has all the attributes of a terrorist organization"); 43 Cong. Q. 1388, 1389 (1985) (address by President Reagan); 84 State Dep't Bull. 12, 13, 15 (Dec. 1984) (Sec. Shultz) (U.S. joins U.K. and Irish government "in opposing any action that lends support to the Provisional IRA"); Staff of House Comm. on Foreign Relations, 101st Cong., 1st Sess., Country Reports on Human Rights Practices for 1988 at 1236-37 (Comm. Print 1989) (Reports submitted by Dep't of State) (PIRA admissions of terrorist activities); Affidavit of Assoc. Att'y Gen. Stephen S. Trott, sworn to Feb. 19, 1987, at para. 8 ("[i]t is the position of the United

597 ("the PIRA is unquestionably a 'terrorist' organization"). The INS has introduced substantial evidence that PIRA is a terrorist organization which commits violent acts against innocent civilians, *see Matter of McMullen*, Interim Dec. 2967 (BIA May 25, 1984). And the BIA has specifically found that the PIRA has engaged in "indiscriminate bombing campaigns, . . . murder, torture, and maiming of innocent civilians who disagreed with the PIRA's objectives and methods." *Id.* (*quoted in McMullen* v. *INS*, 788 F.2d at 597).

In my view, there is substantial evidence that PIRA has committed terrorist activities directed at innocent, civilian populations. *See McMullen* v. *INS*, 788 F.2d at 597 (substantial evidence exists that PIRA committed "terrorist activities directed at an unprotected civilian population"). These "random acts of violence" against civilians constitute "serious nonpolitical crimes" for purposes of 8 U.S.C. § 1253(h)(2)(C). *Id.* at 598.

As the court held in *McMullen* v. *INS*, 788 F.2d at 599, I need not determine that respondent committed any of these unprotected crimes against the civilian population. "We are unmoved by the pleas of a terrorist that he should not in any way be held responsible for the acts of his fellows; acts that, by his own admission, he aided . . . and assisted . . . and otherwise abetted and encouraged." *Id.*[46]

States Government that the crimes committed by Doherty—hostage taking, murder, and assault with intent to commit murder—are terrorist offenses").

[46] Under general principles of conspiracy law, a co-conspirator is chargeable with any criminal act committed by another co-conspirator in furtherance of the conspiracy. *Pinkerton* v. *United States*, 328 U.S. 640, 646-47 (1946). Respondent's membership in the PIRA makes him a co-conspirator in the PIRA's effort to overthrow British rule in Northern Ireland by violent means, and hence responsible for any

I need only find that there is "probable cause" to believe that respondent committed such crimes. *Id.*

In *McMullen,* the court held that conduct remarkably similar to respondent's was sufficient to establish probable cause to believe that the petitioner had committed some of PIRA's unprotected nonpolitical crimes. The relevant passage bears quotation at some length:

> McMullen admits that he was an active member in the PIRA, that he trained its members and participated in unlawful arms shipments as well as bombings of military installations. With regard to the PIRA itself, there is no question that it has undertaken terrorist activities directed at civilian targets in a manner

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nonpolitical crimes his co-conspirators commit in pursuit of that objective. The "PIRA's random acts of violence against the ordinary citizens of Northern Ireland and elsewhere" are "exhaustively documented in the record" of the *McMullen* case. *McMullen* v. *INS,* 788 F.2d at 598. Moreover, the BIA has found that

> the PIRA is a clandestine, terrorist organization committed to the use of violence to achieve its objectives . . . [and has engaged in] . . . attacks on both government civilian institutions and military installations, random violence against innocent civilian populations through indiscriminate bombing campaigns, the murder or maiming of targeted individuals for political reasons based on their public opposition to the PIRA, and the use of violence to maintain order and discipline within the PIRA's membership . . . . Its operations have been funded, in part, through the commission of thousands of armed robberies.

Matter of McMullen, Interim Dec. 2967, slip op. at 4-5 (BIA May 25, 1984) (citations omitted), *aff'd on other grounds,* 788 F.2d 591 (9th Cir. 1986). Based on these judicial and administrative findings, I of course have serious reasons to consider that PIRA members have committed serious nonpolitical crimes in the course of their conspiracy, and thus to conclude that respondent, as a co-conspirator, can be held responsible for committing crimes of such a character, even if he personally did not perform them.

> unprotected as a political offense. We conclude that the "totality of the circumstances," *cf. Illinois* v. *Gates,* 462 U.S. 213, 230, 103 S. Ct. 2317, 2328, 76 L. Ed. 2d 527, 543 (1983), which include McMullen's willing and material involvement in a terrorist organization that carried out acts of violence against civilians, his assistance in training members of that organization and procuring arms shipments, support the BIA's conclusion that there are "serious reasons" to believe that McMullen committed some of these unprotected, serious nonpolitical crimes.

788 F.2d at 599. Here, as with the petitioner in *McMullen,* there clearly is the requisite probable cause to believe respondent has committed unprotected crimes. Respondent is a longstanding active member of the PIRA. *See* discussion *supra* at [46a-48a] and *infra* at notes 47, 53. He has admittedly committed violent acts in furtherance of the purposes of the PIRA. Like the petitioner in *McMullen,* respondent has provided the PIRA with "the physical and logistical support" that enables this terrorist group to operate. *Id.* at 599.[47]

Respondent's membership and participation in, aiding of, and assistance to the PIRA is sufficient to constitute probable cause to believe that respondent has committed

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[47] Respondent readily admits

> the facts that [he] was an "admitted member" of the Irish Republican Army, that he was convicted of the murder of a British Army officer and other violent offenses, that he and seven other IRA volunteers escaped from prison in Northern Ireland, and that he is currently the subject of outstanding warrants of arrest in the United Kingdom are, pursuant to the opinion [by Judge Sprizzo] in *Matter of Doherty,* matters of public information and readily available to all, including immigration judges.

Brief for Respondent-Appellee Joseph Patrick Thomas Doherty, *supra* note 25, at 3 (footnote omitted).

unprotected criminal acts, and therefore sufficient basis upon which to conclude that there are "serious reasons" to believe that respondent has committed "serious nonpolitical crimes.' *McMullen* v. *INS*, 788 F.2d at 598.[48] Indeed, this may even be a stronger case for application of the exception than in *McMullen*, given the record evidence that respondent committed a murder; smuggled large quantities of explosives in a car hijacked by a PIRA unit; drove to an ambush site in a hijacked van, the driver of which was held captive; and took over a family-occupied house in a civilian, residential neighborhood for the purpose of ambushing a British army patrol. *See* Transcript of Respondent's Testimony at 773-74, 783-86 & 792-96, *Matter of Doherty by Gov't of United Kingdom*, 599 F. Supp. 270 (S.D.N.Y. 1984) [hereinafter "Doherty Transcript"].[49] *Compare McMullen* v. *INS*, 788 F.2d at 592-93, 599.[50]

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[48] Attorney General Meese noted in his June 9, 1988 opinion that violence against military personnel in a democratic society is unjustified, as is violence against civilians. Mem. Att'y Gen. at 6. Nothing herein is intended to suggest otherwise. It is not necessary for me to decide here whether violence against military personnel is alone sufficient to satisfy § 1253(h)(2)(C) because (1) respondent's other activities, together with his acts against British military personnel, are clearly sufficient; and (2) respondent's participation in violent acts against civilians is also alone sufficient.

[49] As the dissenting opinion in the BIA decision below pointed out, "it is fortuitous that the civilian hostages [taken by respondent and his associates] were uninjured in view of the fact that they were exposed to a gun battle." *Matter of Doherty*, No. A26 185 231, slip op. at 4 (BIA Nov. 14, 1988) (Morris, B.M., dissenting).

[50] Apart from the *McMullen* analysis, I determine that there are "serious reasons for considering" the offenses indisputably committed by respondent, *see, e.g.*, discussion *supra* note 47, to be "serious nonpolitical crimes" within the meaning of § 1253(h)(2)(C). These crimes standing alone involved disproportionate threats to civilian life and property.

(b) Respondent also has "assisted, or otherwise participated in the persecution of . . . person[s] on account of . . . political opinion," rendering him ineligible for withholding of deportation under 8 U.S.C. § 1253(h)(2)(A). *See McMullen* v. *INS*, 788 F.2d at 600 (Goodwin, J., specially concurring). Respondent is a member of the PIRA, an organization that the BIA found has killed or attempted to kill those who politically oppose its activities.[51] Moreover, as a PIRA officer, respondent was admittedly responsible for distributing arms and gathering ammunition, Doherty Transcript, *supra* at [88a], at 726, and he engaged in training and drilling other PIRA members. *Id.* at 734. These facts establish by ample evidence that respondent would be ineligible for withholding because of his participation in the PIRA's persecution of political opponents.

Again, it is not necessary for me to find that respondent was directly and personally involved in any of the PIRA's attacks on political targets. *See, e.g., McMullen* v. *INS*, 788 F.2d at 600 (Goodwin, J., concurring).[52] Respond-

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[51] *See Matter of McMullen*, Interim Dec. 2967 (BIA May 25, 1984) (PIRA engages in the murder or maiming of target individuals for political reasons based on their public opposition to the PIRA; among these targeted individuals was Ross McWhirter, founder of the *Guinness Book of Records*, for whose death the PIRA claimed "credit").

[52] *Cf. Kulle* v. *INS*, 825 F.2d 1188, 1192-93 (7th Cir. 1987) (almost identical language to 8 U.S.C. § 1253(h)(2)(A) held not to require proof of individual participation); *Schellong* v. *INS*, 805 F.2d 655, 661 (7th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987). *See also United States* v. *Osidach*, 513 F. Supp. 51, 72 (E.D. Pa. 1981) ("under § 13 of the [Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009], mere willing membership—without proof of personal participation in acts of persecution—in a movement that persecute[s] civilians is sufficient to warrant a finding of ineligibilty [for admission into the United States] as a displaced person"); *but cf. Laipenieks* v. *INS*, 750 F.2d 1427, 1431 (9th Cir. 1982).

ent's active roles in arming and training the PIRA, coupled with his willing membership in that organization, the length of his service in it, and the rank he attained,[53] more than suffice to show that he "assisted" the PIRA's political persecutions under the statute. Even if membership in the PIRA, standing alone, would be insufficient to bar respondent from relief under § 1253(h)(2)(A), *see Matter of Rodriguez-Majano,* Interim Dec. 3088 (BIA Sept. 28, 1988), respondent's activities on behalf of the PIRA fairly implicate him in those persecutions.[54]

Additionally, § 1253(h)(2)(A) reaches persons who have "otherwise participated in" persecution, even if they have not "assisted" in the persecution. This broad language covers forms of collaboration that are not otherwise cap-

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[53] In his extradition trial, respondent testified:

> I held several [PIRA] staff positions in Long Kesh [prison], from the section leader, company staff, officer's position. I was a company quartermaster, a company training officer, a company drill sergeant—well, we call them a drill officer. You call them in the United States Army drill Sergeants. I was in charge of the men in the yard and military formation, etc. After that I was a company—my God, I was everything—a company finance officer, and the highest rank that I have ever held inside the company was the company adjutant. I was the second in command of a company of 78 men.

Doherty Transcript, *supra* at [88a], at 734.

[54] Respondent reads *Rodriquez* to make the INS's persecution argument "frivolous." Respondent's Brief, *supra* note 11, at 27 n.19. But *Rodriquez* holds only that those who are members of opposing forces in a civil war are not ineligible for withholding of deportation or asylum as political persecutors if they inflict harms arising as the natural consequence of civil strife (*e.g.*, burning automobiles). The instant case, however, involves a terrorist group's particularized attempts to destroy targeted civilian political opponents.

tured by the Act, and undoubtedly extends to respondent's activities.[55]

On either of the above bases, respondent is not entitled to withholding of deportation.

CONCLUSION

For the foregoing reasons, the decision of the BIA is disapproved, and the respondent's motion to reopen these proceedings is denied.

/s/ DICK THORNBURGH
Dick Thornburgh
Attorney General

Date: June 30, 1989

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[55] General principles of conspiracy law again underscore this conclusion. *See supra* note 46. The statute's broad reference to those who "otherwise participate" in political persecutions is fairly read to encompass those individuals whose co-conspirators engage in political persecutions in furtherance of the conspiracy.

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board Immigration Appeals

File: A26 185 231—New York

Date: Nov. 14, 1988

IN RE: JOSEPH PATRICK THOMAS DOHERTY
A.K.A. JOSEPH REILLY, A.K.A. HENRY J. O'REILLY

IN DEPORTATION PROCEEDINGS
MOTION

Oral Argument: August 17, 1988

On behalf of respondent: Mary Boresz Pike, Esquire
Somerstein & Pike
401 Broadway, 27th Floor
New York, New York 10013

On behalf of service: J. Scott Blackman
Assistant District Director

CHARGES:

Order: Sec. 241(a)(1), I&N [8 U.S.C. § 1251(a)(1)]—Excludable at entry under section 212(a)(9), I&N Act [8 U.S.C. § 1182(a)(9)]—Crime involving moral turpitude

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)]—Excludable at entry under section 212(a)(10), I&N Act [8 U.S.C. § 1182(a)(10)]—Convicted of two or more crimes with aggregate sentences to confinement of five years or more

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)]—Excludable at entry under section 212(a)(19), I&N Act [8 U.S.C. § 1182(a)(19)]—Entered by fraud or willful misrepresentation of a material fact

Sec. 241(a)(1), I&N [8 U.S.C. § 1251(a)(1)]—Excludable at entry under section 212(a)(20), I&N Act [8 U.S.C. § 1182(a)(20)]—No valid immigrant visa

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)]—Excludable at entry under section 212(a)(27), I&N Act [8 U.S.C. § 1182(a)(27)]—Entered to engage in activities prejudicial to the public interest

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)]—Excludable at entry under section 212(a)(28)(F), I&N Act [8 U.S.C. § 1182(a)(28)(F)]—A member of an organization that teaches the duty or necessity of unlawfully assaulting or killing officers of an organized government.

Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)]—In the United States in violation of law

APPLICATION: Motion to reopen

On September 19, 1986, the immigration judge found the respondent deportable on his own admissions under section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1), for having entered in February 1982, by fraud and without a valid immigrant visa.[1] The

[1] The immigration judge specifically ruled only that the respondent was deportable because he was excludable under section 212(a)(20),

respondent was ordered deported to the Republic of Ireland (Eire) the country designated by the respondent pursuant to section 243(a) of the Act, 8 U.S.C. § 1253(a), and to the United Kingdom and Colonies in the alternative. The respondent declined to apply for asylum or withholding and conceded deportability in the expectation of being returned to Eire. The Immigration and Naturalization Service appealed contending that the immigration judge should have made findings on all of the grounds of deportability charged against the respondent and that the respondent should not have been ordered deported to Eire, as deportation to Eire would be prejudicial to the interests of the United States. 8 U.S.C. § 1253(a). The Board of Immigration Appeals dismissed the Service appeal on March 11, 1987. On May 22, 1987, a Service motion to supplement the record or to remand for the consideration of additional evidence was denied upon reopening by the Board. The Board's decision of May 22, 1987, was certified to the Attorney General at the request of the Commissioner of the Immigration and Naturalization Service on May 29, 1987. Subsequently, on December 3, 1987, the respondent filed a motion to reopen proceedings to allow him to apply for asylum and withholding of deportation and to redesignate the country of deportation. The respondent alleged that the passage of a law allowing his extradition from Eire to the United Kingdom was a changed circumstance justifying reopening proceedings to allow him to apply for asylum. The respondent further filed a motion for the Attorney General to recuse himself in this case. The Board also referred the respondent's motions to the Attorney General.

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but the transcript makes clear that he found the respondent deportable because he was excludable under section 212(a)(19) also (Tr. at 39).

On June 9, 1988, the Attorney General denied the respondent's motion to recuse and upheld the Board's determination that the immigration judge was not obliged to allow the Immigration and Naturalization Service to prove each charge of deportabiity, but he determined that the Service had shown that the deportation of the respondent to Eire would be prejudicial to the interests of the United States. He remanded the respondent's motion to reopen to the Board for its decision. We are informed that the Attorney General's decision has been appealed to the Court of Appeals for the Second Circuit. Oral Argument on the motion to reopen was held before the Board on August 17, 1988. The respondent's motion to reopen will be granted.

The statute provides that:

> The deportation of an alien in the United States provided for in this Act, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, . . . If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. 8 U.S.C. § 1253(a).

An alien who is seeking withholding of deportation from any country must show that his "life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." Section 243(h)(1) of the Act,

8 U.S.C. § 1253(h)(1); *INS* v. *Stevic,* 467 U.S. 407 (1984). In order to make this showing the alien must establish a "clear probability" of persecution on account of one of the listed reasons.

To be eligible for a grant of asylum, an alien must demonstrate that he is a "refugee" within the meaning of section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A). Section 208 of the Act. That is that he is unable or unwilling to return to his country of nationality because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *INS* v. *Cardoza-Fonseca,* ____ U.S. ____, 107 S. Ct. 1207 (1987). In *Matter of Magharrabi,* Interim Decision 3028 (BIA 1987), we held that the asylum applicant has established a well-founded fear of persecution if he shows that a reasonable person in his circumstances would fear persecution for one of the five grounds specified in the Act.

Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. 8 C.F.R. §§ 3.8; 103.5(a). No motion shall be granted unless the evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. 8 C.F.R. §§ 3.2, 242.22.

An alien may request that an exclusion or deportation proceeding be reopened pursuant to 8 C.F.R. § 103.5 or 8 C.F.R. § 242.22 respectively, on the basis of a request for asylum. Such request must reasonably explain the failure to request asylum prior to the completion of the exclusion or deportation proceeding. If the alien fails to do so, the asylum claim shall be considered frivolous, absent any evidence to the contrary. 8 C.F.R. § 208.11.

A motion to reopen to apply for relief under 8 C.F.R. § 242.17, including withholding of deportation, will not

be granted if respondent's right to make such an application was fully explained to him and he was afforded an opportunity to do so at the hearing, unless circumstances have arisen thereafter on the basis of which the request is being made. 8 C.F.R. § 242.22.

No motion to reopen for the purpose of affording an alien an opportunity to apply for any form of discretionary relief, i.e., asylum, may be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefor was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. 8 C.F.R. §§ 3.2, 242.22.

The respondent originally argued that the motion should be granted because the Service had delayed the deportation of the respondent so that the law in Eire has changed allowing the respondent to be returned to the United Kingdom where he alleges he will be persecuted. Therefore, he argued, he should be allowed to change his designation of a country of deportation. Furthermore, he now argues, the Attorney General has determined that the respondent should not be allowed to choose Eire as the country of deportation, but should be deported to the United Kingdom. Consequently, he should be allowed to apply for asylum and withholding of deportation from the United Kingdom.

The Service maintains that the respondent's motion fails to meet the requirements of the regulations in that no asylum application was filed with the motion. Further, the Service maintains that the respondent has not explained adequately his failure to file an asylum application at the hearing before the immigration judge, and that he has failed to show new evidence which would be presented at the hearing on remand. The Service argues that the decision of the Attorney General ordering the respondent de-

ported to the United Kingdom is not new evidence because the respondent knew at the hearing the Service objected to the designation of Eire and wanted to deport him to the United Kingdom. Further, the Service alleges that the respondent has failed to make a prima facie case of a well-founded fear of persecution in the United Kingdom. According to the Service, the evidence submitted in support of the motion regards general conditions and does not relate to the respondent. Also, the motion should be denied as the respondent is excludable under 243(h) of the Act because he committed serious crimes outside the United States and for the same reason asylum would be denied as a matter of discretion.

Although the right given by the statute to designate a country of deportation is a substantive right, *Rodriguez-Agustin* v. *INS,* 765 F.2d 782 (9th Cir. 1985), there is no absolute right to withdraw a prior designation of a country of deportation. *Riasati* v. *INS,* 738 F.2d 1115 (10th Cir. 1984); *Wong Kam Cheung* v. *INS,* 408 F.2d 35 (2d Cir. 1969). Regardless of the merit of the respondent's first argument that a change of law in the Republic of Ireland is sufficient reason to reopen proceedings, we find that the respondent has shown he should be allowed to apply for asylum.

At the time of the hearing the reasonable expectation of the respondent was that he would be deported to Eire. The likelihood of his being deported to the United Kingdom appeared remote. Normally, the respondent would be deported to the alternate country of deportation only if the country named by the respondent refused to accept him or did not reply to the Attorney General's inquiry as to whether it would accept him. 8 U.S.C. § 1253(a). He had received assurances that he would be admitted to Eire from representatives of that government. Consequently, he withdrew his request for asylum, conceded deportability, and applied for no relief. Given the state of the law at that time, the respondent could not have been expected to anticipate that he would not be deported to his country of choice. The respondent's failure to file for asylum under these circumstances is excusable. If the respondent were expected to foresee and guard against the unprecedented circumstances which arose two years later, no alien would ever fail to apply for asylum to any country to which he might remotely be deported, if he had a fear of returning there.

In addition, the Attorney General's decision of June 1988 disallowing the respondent's choice of a country of deportation constitutes changed circumstances which have arisen since the hearing. The fact that the respondent is now scheduled to be deported to the United Kingdom is undoubtedly new evidence which could not have been presented at the deportation hearing. Further, the respondent has submitted recently published background evidence which we find to be material to the respondent's case. We are not concerned that an asylum form did not accompany the motion because the respondent had already submitted a Form I-589 in connection with his earlier application (Tr. at 7-9). *See* 8 C.F.R. § 3.22(b). The respondent has submitted an affidavit and other additional evidence in support of his motion setting forth the facts to be proved at the reopened hearing.

In order to reopen proceedings the respondent would have to show a prima facie claim of a well-founded fear of persecution. We find that the evidence submitted by the respondent, if unrebutted, is sufficient to meet that burden and, also, that the motion should be granted in the exercise of discretion. The respondent has not been accused of any violations of law in the United States other than his illegal entry. At least one United States court has found that his crimes in the United Kingdom were politi-

cally motivated. *In Re Doherty,* 599 Fed. Supp. 270 (S.D.N.Y. 1984). The Service has alleged that the respondent has engaged in conduct which renders him either ineligible for withholding or unworthy of the benefit of asylum. The Service will have the opportunity to prove its allegations upon reopening of the proceedings.

Accordingly, the motion to reopen will be granted.

ORDER: The motion to reopen to apply for asylum and withholding of deportation is granted.

/s/ DAVID L. MILHOLLAN
For the Board

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board Immigration Appeals

File: A26 185 231—New York

Date: Nov. 14, 1988

IN RE: JOSEPH PATRICK THOMAS DOHERTY

DISSENTING OPINION: James P. Morris, Board Member

I respectfully dissent.

I would not reopen these proceedings to permit Mr. Doherty to apply for asylum and withholding of deportation to the United Kingdom.

It is well established that a motion for reopening deportation proceedings should be granted only upon the showing of prima facie evidence that the movant is eligible for the relief sought. *Matter of Lam*, 141 I&N Dec. 98 (BIA 1972). The majority opinion finds that such a prima facie claim has been shown, but it provides no analysis whatsoever as to how that conclusion was reached.

It is clear that if deported to the United Kingdom the respondent will face punishment. He has been sentenced to life imprisonment after having been convicted of murder. Such punishment would not constitute persecution under the immigration statutes. In connection with his motion to reopen, the respondent has submitted reports suggesting that young men suspected of being members of the armed opposition in Northern Ireland may have been killed by security forces rather than being arrested and charged with specific offenses. An Amnesty International report submitted by the respondent reflects that that organization is "concerned" that the killings may have resulted from a deliberate policy. This concern does not rise to the level of prima facie evidence that the respondent has a basis for a

well-founded fear of persecution. Moreover, the respondent has been convicted for murder and sentenced to imprisonment for life. Therefore, the respondent faces a long period of incarceration, and the British security forces would have no reason to take any further action to eliminate him as a threat to security. I don't find the affidavit submitted by the respondent's mother to be sufficient to support a motion to reopen. The affidavit details difficulties that her family has encountered with the British security forces. Her claim that the actions described were taken against her family because of their religion and political opinion is an unsupported conclusion. She stated for example, that her daughter was arrested and charged with murder. However, she was released because insufficient evidence was produced at trial to support a conviction. Trial and acquittal are hardly indicative of persecution. Mary Doherty's affidavit also fails to mention that the respondent is a member of the Provisional Irish Republican Army (PIRA) or that he has engaged in violent activities in support of that organization. She does not deny that other members of her family may also be involved in such activities or that the British security forces may have good reason to suspect that they are or have been so involved. We have held that it is not persecution under the immigration statutes for the government of a country to investigate and detain individuals suspected of aiding or being members of a guerrilla organization. *Matter of Maldonado-Cruz*, Interim Decision 3041 (BIA 1988). In view of the likelihood that the British security forces have reason to suspect members of Mary Doherty's family of being involved in criminal activities, which the affidavit does not deny, her unsupported conclusion that they have been abused because of their religion or political views is insufficient to warrant reopening.

For these reasons, I find that the motion to reopen should be denied for failure to make a prima facie showing that the respondent has a well-founded fear of persecution in the United Kingdom.

The majority also holds that reopening is warranted in the exercise of discretion. It is in this regard that I most emphatically disagree. The only reason given by the majority for its conclusion is that Doherty has not been accused of any violations of law in the United States other than his illegal entry, and the fact that the federal judge in Doherty's extradition proceedings found that his crimes in the United Kingdom were politically motivated. This simplistic approach totally ignores several factors, discussed below, which clearly relate to the appropriateness of a favorable exercise of discretion with respect to reopening. Further, it is insufficient merely to conclude that at a reopened hearing the Service will have an opportunity to prove that the respondent is unworthy of the benefit of asylum. These deportation proceedings began in 1983. This is a very significant case with substantial impact on the national interests of the United States, and it should be concluded promptly. Further proceedings which contemplate a possible grant of asylum or withholding of deportation to this terrorist and convicted murderer are not warranted.

The majority expresses concern about the changed circumstances resulting from the Attorney General's decision that the respondent should be deported to the United Kingdom. It is stated that his failure to seek asylum with respect to possible deportation to the United Kingdom is excusable and that he should now be provided a hearing in which he can attempt to show that he would be subject to persecution in the United Kingdom. In *Matter of Gonzalez*, Interim Decision 3071 (BIA 1988), the Board held that it was inappropriate to pretermit an asylum applica-

tion on the basis that the applicant had ben convicted of a particularly serious crime and that asylum would be denied in the exercise of discretion. The Board held that under the statutes and regulations the asylum applicant is entitled to a full evidentiary hearing. The rationale of *Matter of Gonzalez, supra*, does not apply here because what we have before us is a motion to reopen deportation proceedings, not an initial deportation proceeding. The applicable case here is *INS* v. *Abudu*, 485 U.S. ____, 108 S. Ct. 904 (1988). In that case the Supreme Court said that the Board has discretion to deny a motion to reopen even if the alien has made a prima facie case. The court specifically rejected an argument that this rule does not apply in asylum cases.

The Supreme Court went on to point out that motions to reopen are disfavored because there is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their cases. The court also said that an alien who has already been found deportable has a much heavier burden when he first advances his request for asylum in a motion to reopen. The majority certainly has not imposed a heavy burden on Doherty in his effort to have his proceedings reopened.

I am inclined to believe that the majority was overly influenced by *Matter of Gonzalez* because the decision of the majority does not seriously address the issue of discretion. As I have noted, the majority points to the fact that the respondent has not been accused of any violations of law in the United States other than his illegal entry. The respondent's lack of criminal activity in this country is of no significance whatsoever. It is his criminal activity in the United Kingdom that needs to be examined to determine whether he merits consideration of his asylum application in a new hearing. The majority has refused even to consider that criminal record despite the extremely serious nature of the crimes which he has admitted committing and for which he had been convicted. Noting the fact that a federal judge is of the opinion that the crimes were political in nature is not responsive to the Board's obligation to determine whether or not reopening of deportation proceedings is warranted as a matter of discretion. We have a responsibility to examine the respondent's criminal record and decide whether the crimes for which he has been convicted are so serious that we should not countenance a grant of asylum even if the respondent is able to prove at a reopened hearing that all of the allegations made in support of his motion to reopen are true.

I am persuaded that Doherty is a terrorist and a member of a terrorist organization. Accordingly, I believe that it would be detrimental to the interests of the United States either to provide a refuge for him in this country or to fail to deport him to the United Kingdom.

In *Matter of McMullen*, Interim Decision #2967 (BIA 1984), this Board found that the Provisional Irish Republican Army is a clandestine, terrorist organization committed to the use of violence to achieve its objectives. The respondent has admitted his membership in the PIRA and his participation in its violent activities. He stands convicted of the murder of a British officer in a premeditated armed attack. The court in *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984), held that Doherty was not extraditable because his crime was political in nature. The court pointed out that the attack was against military personnel and that the civilian hostages taken by Doherty and his associates were not harmed. Of course, it is fortuitous that the civilian hostages were uninjured in view of the fact that they were forcibly exposed to a gun battle. The court also suggested that its decision may have been different if the crime involved a bombing which resulted

in the death or injury of innocent civilians. Yet, it must be remembered that Doherty has also been convicted of transporting explosives for the PIRA. It is well known that the PIRA has used explosives on a number of occasions in which innocent civilians were killed or injured. Doherty cannot escape responsibility for such activities simply because he has not been convicted of placing the bombs for explosion or because the specific explosives that he transported cannot be traced to a particular bombing scene. In *McMullen, supra*, the Board held McMullen accountable for violence committed by the PIRA because of his role in coordinating the shipment of arms from the United States to the PIRA in Northern Ireland. Doherty's activities are equally blameworthy. In any event, in considering this motion we are not constrained by the provisions of the extradition statutes and treaties.

Finally, I am in complete agreement with the decision of the Attorney General of June 9, 1988. At page 6 of that decision the Attorney General stated as follows:

> The facts established in the extradition proceedings show that respondent killed a member of the British army. While the victim was a soldier rather than a civilian, the use of violence against a democratic society is unjustified irrespective of the identity of the victim. It is unjustified for the fundamental reason that in a democratic society the political system is available for peaceful redress of grievances. Given the availability of peaceful alternatives, there is no legitimate reason to resort to violence against any person whether or not that person has an official status within the State.

For the foregoing reasons, I find the respondent unworthy of a favorable exercise of discretion in granting the motion to reopen or in granting relief at a reopened proceeding. In addition to the respondent's unworthiness, I would consider the effect of a new hearing and possible relief on our national interests. The Attorney General, in his decision of June 9, 1988, pointed out that it would be injurious to the national interests of the United States to provide the respondent a haven where he can avoid responsibility for his terrorist activities in the United Kingdom. The Attorney General said that it is the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment. I agree with and support that policy. I concur with the Attorney General in accepting the assessment of the State Department that failure to return Doherty to the United Kingdom could undermine that government's confidence in the ability of the United States to cooperate in counter-terrorism efforts of the two countries. Accordingly, I would deny the motion to reopen in the exercise of discretion, and because of respondent's failure to make a prima facie showing of a well-founded fear of persecution.

/s/ JAMES P. MORRIS
James P. Morris
Board Member

I concur in the foregoing dissenting opinion.

/s/ FRED W. VACCA
Fred W. Vacca
Board Member

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board Immigration Appeals

File: A26 185 231—New York

Date: Nov. 14, 1988

IN RE: JOSEPH PATRICK THOMAS DOHERTY

SPECIALLY CONCURRING OPINION: Michael J. Heilman, Board Member

I respectfully concur.

The dissent provides two major reasons for denying this motion to reopen, that the motion should be denied in the exercise of discretion, and that Mr. Doherty's claim of persecution fails on the merits. Neither proposition appears to me to be so indisputable that reopening should be denied.

If only what the dissent states had any relevance to the outcome of this motion. American asylum law is in a sorry state indeed, and the dissent only tells part of the story.

Many persons who have engaged in violence, or who have been accused of engaging in violence, have been granted asylum in the United States by the very Department of Justice and the very Immigration and Naturalization Service which have so strenuously tried to deport Mr. Doherty. Federal courts which have considered asylum claims by the Dohertys of the world have consistently ruled in their favor. It may well be that this Board has consistently ruled against the grant of asylum to "terrorists," but the Department of Justice has in every case acquiesced in judicial decisions which have reversed the Board on this issue.

The dissent finds that Mr. Doherty should not be granted asylum in discretion because he was involved in violent criminal activities. It relies on this Board's decision

in *Matter of McMullen*, Interim Decision 2967 (BIA 1984) for the proposition that the "PIRA" is a "terrorist" organization committed to the use of violence to force the British Government to withdraw from Northern Ireland. The dissent also cites *Matter of Maldonado-Cruz*, Interim Decision 3041 BIA (1988) for the proposition that the British Government has the right to seek out and punish persons who are involved in violent guerrilla activities.

The dissent does not cite for obvious reasons the numerous judicial decisions which clearly are at odds with the Board, and in which the Attorney General has acquiesced. The most recent and pointed example is a decision of the Ninth Circuit in which former Associate Attorney General, now Judge Trott, joined, *Blanco-Lopez* v. *INS*, No. 87-7060 September 29, 1988. In that decision, it was held that a Salvadoran national who had been arrested for suspected gun-running to Salvadoran guerrillas, was entitled to asylum on that ground *alone*, because the Salvadoran "security forces believed him to be a guerrilla and attempted to persecute him for it."

What is the difference between a Salvadoran guerrilla and Mr. Doherty, between the PIRA and the Salvadoran "FMLN," or any of its five guerrilla sub-groups? They are all engaged in a violent political struggle. They are all being sought by the governments they are attacking. They are all loosely described as "Marxist" or "leftist".

Indeed, it bears noting that the United States pours substantial sums of money into El Salvador to help the Government of El Salvador fight those same guerrillas decisions like *Blanco-Lopez* v. *INS*, hold are persecuted by the Government of El Salvador. The United States has committed itself to the defense of the Salvadoran Government economically and politically also, and even provides military advisors. One would assume from this that

American security and foreign policy interests are under greater assault by Salvadoran guerrillas than they are by the PIRA.

So where is the difference between Mr. Doherty and a Salvadoran guerrilla? In the Attorney General's decision quoted by the dissent it is said that the "use of violence against a democratic society is unjustified irrespective of the identity of the victim." I have expressed the same view in similar words, but how relevant are these words when compared to the *actual* decisions being made in asylum cases in this country? The British Government is described as "democratic" by the same U.S. Department of State which describes the Government of El Salvador as "democratic." *See*, Country Reports on Human Rights Practices for 1987, Department of State, Joint Committees of the Senate and House of Representatives, 100th Congress. 2d Sess. at 485,1074 (El Salvador "is a representative democracy"; Great Britain enjoys a "democratic political system.")

Surely the difference is not that the Government of El Salvador has been criticized for political repression, limitations on civil liberties and police brutality, and the British Government has not. A perusal of the most recent Country Reports would disabuse one of that notion, as would a reading of the materials provided by Mr. Doherty in support of his motion.

Is the difference that Mr. Doherty is Irish and the Salvadoran guerrillas are not? Is this a basis for distinction for the exercise of discretion? Do we consider British lives dearer than those of Salvadorans and Americans who have been killed or harmed by the Salvadoran guerrillas? Is it a question of the British Government being more sensitive, or perhaps, that the Government of El Salvador has not yet realized that the Government of the United States

unaccountably both helps it fight the guerrillas and grants them asylum?

That this practice of granting asylum to members of "terrorist" organizations is entirely common-place may also be seen in a recent decision enjoining the Immigration and Naturalization Service from certain practices in the treatment of Salvadoran nationals. *Orantes-Hernandez* v. *Meese*, 685 F.Supp. 1488, 1511 (C.D. Cal. 1988). There, the court enjoined the Service from telling class members, among other things, that "asylum is *only* available to guerrillas or soldiers." Paragraph (d), of the order. (Emphasis added.)

But it is perhaps a bit misleading to discuss Salvadoran guerrillas and thereby leave the impression that this practice of granting asylum to "terrorists" is confined to that nationality. This Board has seen cases where asylum was granted to persons of other nationalities as well, whose claim was founded solely on the assertion that a government was after them for actual or suspected involvement in guerrilla or terrorist activities. This has occurred, for example, with applicants from India, Sri Lanka, Guatemala, and Ghana. The first two countries are generally described as democracies and the United States maintains friendly relations with them, as well. In a very recent Indian case, in fact, the Department of State recommended a grant of asylum, in its advisory opinion stating it was "important to note" that the applicant was a member of an "extremist" organization which had engaged in violence.

The dissent addresses none of these cases, and cannot, because they all show the speciousness of denying asylum to Mr. Doherty because he is a "terrorist".

As to the merits of the asylum claim, both the dissent and the Service are on even weaker ground. Every pub-

lished judicial decision on the grant of asylum to "guerrillas" or "terrorists" has held that a government persecutes a person by seeking him out for politically motivated violence. In effect, and in contrast to the dissent's and the Service's views, "political asylum" in the United States *has* come to be *completely* equitable with the "political offense exception" applied in extradition cases. It is not irrelevant, therefore, that Mr. Doherty has been found to be entitled to the benefit of the "politial offense exception."

I have already mentioned the most recent judicial holding on the eligibility for asylum of a suspected Salvadoran gun-runner. It might be useful to point out that the Board in dismissing the appeal in that case, had specifically held that the Government of El Salvador had the legitimate right to seek out persons engaged in guerrilla activities, and cited what the Board though were relevant Ninth Circuit decisions on that subject. The court did not even refer to those decisions in reversing the Board, obviously having found those prior decisions so irrelevant as to not require comment.

In another decision material to the merits of this asylum claim, the Ninth Circuit held that an actual, admitted Salvadoran guerrilla who had engaged in countless bombings and armed robberies, and who was sought by the Government of El Salvador for that reason alone, was entitled to asylum because he was a member of a "persecuted political organization," the "Front for Popular Liberation," a major Salvadoran guerrilla organization. *Garcia-Ramos* v. *INS*, 775 F.2d 1370 (9th Cir. 1985). In *Aviles-Torres* v. *INS*, 794 F.2d 441 (9th Cir. 1986), the court held, again without murmur from the Department of Justice, that a person described as a "guerrilla" in a newspaper article had established a claim of persecution as to the Government of El Salvador.

In short, while it may be true that this Board has held that a person suspected of being, or who actually is, a guerrilla engaged in violence against his government, is not persecuted for that reason, judicial decisions on this subject have consistently held otherwise, and the Immigration and Naturalization Service and the Department of Justice as a whole have acquiesced in those decisions. As this is so, it is not at all clear to me that the dissent's position on this subject is the interpretation of the asylum laws that is actually applied as a general rule. There is also the stark fact that the Department of Justice in its various agencies, and of its own volition, does grant asylum to persons thought to have engaged in "terrorist" activities, whatever the "policy" may be in the abstract.

Likewise, it seems to me that *Matter of McMullen* aside, the weight of opinion is in favor of Mr. Doherty as to whether he is ineligible for a grant of asylum on the ground that he was a member of an organization which engaged in the persecution of others, under section 243(h)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h)(2)(A). In *Garcia-Ramos* v. *INS, supra*, it was undisputed that the respondent was a member of a guerrilla organization and had engaged in armed robberies and bombings. The Service there did not argue that he was barred from a grant of asylum for his activities or those of his guerrilla group.

In a decision issued a little more than a month ago, this Board expressly rejected the idea that an admitted member of a Salvadoran guerrilla organization was barred from a grant of asylum. *Matter of Rodriguez*, Interim Decision ____ (BIA September 28, 1988). There, we recognized that violent acts incidentally directed at the overthrow of a government, or committed in defense of that government in time of civil war, are not acts of persecution.

The Service's further contention that Mr. Doherty is barred from withholding of deportation for having commited a "particularly serious crime" within the meaning of section 243(h)(2)(B) of the Act, 8 U.S.C. § 1253(h)(2)(B) appears equally misplaced. This provision has uniformly been interpreted to apply to crimes committed within the United States, and not to relate to offenses committed outside the United States. See, *e.g.*, *Matter of Carballe,* Interim Decision 3007 (BIA 1986).

As to the Service's contention that Mr. Doherty is ineligible for a grant of withholding of deportation under section 243(h)(2)(C) of the Act, 8 U.S.C. § 1253(h)(2)(C), that provision specifically requires the Service to establish that his offenses cannot be defined as "nonpolitical crimes". There has already been a definite if not necessarily definitive finding by a United States District Court that Mr. Doherty's offenses fall within the "political offense" exception to extradition. *In re Doherty*, 599 F. Supp. 270 (S.D. N.Y. 1984). It would seem that the Service is continuing an argument that understandably failed when it was previously attempted.

It is therefore clear to me that in every major respect, the views and analysis provided in the dissenting opinion and by the Service may well have no relevance whatsoever in the adjudication of this motion to reopen and the underlying application for asylum and withholding of deportation. They appear to be contradicted fundamentally in actual practice and application and are purely theoretical objections.

The Service may oppose this motion to reopen; what it has not done is provide any cogent distinction between Mr. Doherty's case and that of the Salvadoran guerrillas, and others who have been granted asylum in the United States openly in the last several years.

The only difference I can detect is that of nationality. This is no basis on which to deny asylum in discretion, and is certainly no basis on which to apply a different legal theory of what constitutes an act of persecution.

/s/ MICHAEL J. HEILMAN
Michael J. Heilman
Board Member

APPENDIX D

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C. 20530

In re: Joseph Patrick Thomas Doherty (A26-185-231)

IN DEPORTATION PROCEEDINGS

Under 8 U.S.C. 1253(a), an alien is to be deported to a country designated by the alien if that country is willing to accept him "unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States." In this case, the Board of Immigration Appeals (BIA) ruled that there was insufficient evidence that the deportation of respondent to the Republic of Ireland (Ireland) was prejudicial to the interests of the United States and accordingly rejected the request of the Immigration and Naturalization Service (INS) that respondent be deported to the United Kingdom of Great Britain and Northern Ireland (the United Kingdom). Pursuant to C.F.R. 3.1(h)(1)(iii), I granted the INS's request to review the decision of the BIA. For the reasons set forth below, I disapprove the BIA's decision and conclude that it would be prejudical to the interests of the United States for respondent to be deported to Ireland and that he should be deported instead to the United Kingdom.

I.

Respondent is a citizen of both Ireland and the United Kingdom. He was convicted in the United Kingdom in 1981 of murder, attempted murder, and possession of

firearms and ammunition with intent to endanger life or cause serious injury to property. These charges arose out of an incident in which respondent and other members of the Provisional Irish Republic Army ("PIRA") ambushed a British army convoy. One of the soldiers was killed during the attack. Prior to this sentencing, respondent escaped from prison and fled to Ireland and then to the United States, which he entered illegally in 1982.

Respondent was arrested by the INS in 1983. The United States, acting on behalf of the United Kingdom, instituted proceedings to extradite him to that country. The district court, however, held that his actions involving the ambush of the British army patrol and escape from prison fell within the political offenses exception to the extradition treaty between the United States and England, and thus denied the request for extradition. *In Re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984).

Respondent's deportation proceeding had been stayed during the pendency of the extradition litigation. When it resumed, respondent conceded his deportability at a hearing before the immigration judge on the basis of having entered without valid immigration documents, 8 U.S.C. 1251(a)(1), 1182(a)(19), (20), and designated Ireland as the country to which he wished to be deported.[1] INS objected to Ireland as the country of deportation on the ground that deportation there would be prejudicial to the

[1] INS had added several other grounds for deportation, 8 U.S.C. 1182(a)(9), (10), (27), (28)(F)(ii). These charges deal with criminal conduct, either actual or potential. INS requested that it be allowed to prove these additional charges. The immigration judge declined, holding that since respondent had conceded deportability, there was no point in proving that he was deportable on additional grounds. This holding was affirmed by the BIA. BIA Decision of March 11, 1987 at 3.

interests of the United States, and contended that he should instead be deported to the United Kingdom. In support of this contention it supplied the immigration judge with newspaper articles and speeches on the general issue of terrorism. Although INS was given a continuance of one week to produce further evidence to support its contention, it failed to submit any additional evidence.

On the basis of this record, the immigration judge held that respondent should be deported to the country he had designated, Ireland, as INS had failed to produce any evidence that deportation to Ireland would be prejudicial to the interests of the United States. INS appealed this decision to the BIA, arguing that respondent's deportation to Ireland would be prejudicial to the interests of the United States. On March 11, 1987, the BIA affirmed the decision of the immigration judge, stating:

> [W]e are unwilling to find that deportation to the Republic of Ireland would be prejudicial to the interests of the United States in the absence of clear evidence to support that conclusion. The Service was granted a continuance to allow it to secure evidence of such interest, but it has produced none.

BIA Decision of March 11 ("March Decision"), at 5.

When it issued this opinion, the BIA was unaware that on March 4 INS had filed a Motion to Supplement the Record or to Remand for Further Proceedings Before the Immigration Judge (Motion).[2] The Motion contained an affidavit from Associate Attorney General Trott, signed on February 19, 1987, stating that in his judgment the

[2] INS had filed the Motion with the BIA on March 5, but it was apparently lost or misfiled due to administrative error. BIA opinion of May 22, 1987, at 3.

deportation of respondent to Ireland would be prejudicial to the interests of the United States.

After the BIA had issued its March Decision, the INS successfully moved the BIA to reopen the appeal for consideration of its Motion. The BIA declined, however, to remand the case to the immigration judge, holding that the affidavit did not constitute previously unavailable evidence as required by BIA's regulations, 8 C.F.R. 3.2, 3.8. BIA Decision of May 22, at 3-5. In addition, the BIA stated that "the affidavit does not purport to be based upon evidence that respondent's deportation to the Republic of Ireland will be prejudical to the United States' interests. Rather, it appears to be based only upon the . . . logical inference" that our allies would view respondent's deportation to Ireland as shielding a terrorist from punishment. *Id.* at 5.[3]

[3] Counsel for respondent was notified that the Attorney General would be reviewing the decision of the BIA, and would determine whether the deportation of respondent to Ireland would be prejudicial to the interests of the United States and whether, instead, he should be deported to the United Kingdom. Counsel for respondent was given the opportunity to submit a memorandum addressing the question under review. Counsel for respondent was also informed that the Attorney General would be considering Mr. Trott's affidavit in the course of his review of the BIA's decision, and thus that respondent might wish to respond to the facts and reasoning contained in that affidavit. Counsel for respondent filed a memorandum, as well as a shorter supplemental letter in response to a subsequent letter from INS setting out its views on the case. In my review I have considered these filings made by counsel for respondent and INS, the record of the proceedings below, Mr. Trott's affidavit, the decision in the extradition proceedings cited in Mr. Trott's affidavit, and a letter from Michael H. Armacost, Undersecretary for Political Affairs at the Department of State, setting forth the Department of State's views regarding the interests of the United States in this case.

II.

Respondent was notified that the Attorney General would consider only whether respondent's deportation to Ireland would be prejudicial to the interests of the United States and whether, instead, he should be deported to the United Kingdom. Nonetheless, in his memorandum, respondent raises the issue of the Attorney General's authority to review the BIA's decision. Respondent appears to contend that the Attorney General lacks the power to overturn the BIA's decision, particularly if he were to do so after having considered Mr. Trott's affidavit. Given that respondent has raised the issue, it is appropriate, before turning to the merits, to address the scope of the Attorney General's decisionmaking authority in this case.

Section 1253(a), like most other provisions of the immigration law, vests the power to make determinations in the Attorney General personally.[4] That power includes the power to receive evidence, make findings of fact, and decide issues of law. The Attorney General has delegated his decisionmaking authority, in the first instance, to the BIA and the immigration judges.[5] They exercise "such discretion and authority conferred upon the Attorney General by [law] as is appropriate and necessary for the disposition" of the case. 8 C.F.R. 3.1(d)(1), 236.1. Thus, to the extent that the immigration judges or the BIA have

[4] See generally 8 U.S.C. 1103.

[5] The BIA is entirely a creation of the Attorney General. *See Greene* v. *INS*, 313 F.2d 148 (9th Cir.), *cert. denied*, 374 U.S. 828 (1963). Immigration judges receive some of their powers and duties directly from Congress, 8 U.S.C. 1252(b), and some by delegation from the Attorney General. *See Lopez-Telles* v. *INS*, 564 F.2d 1302 (9th Cir. 1977).

authority to make determinations under section 1253(a), including the authority to receive evidence and make findings of fact, it is because they are exercising, by delegation, the Attorney General's authority.

Although he has delegated his decision-making authority in the first instance to the immigration judges and the BIA, the Attorney General has retained the authority to review the decisions of the BIA pursuant to 8 C.F.R. 3.1(h), and thus has retained final decision-making authority. *Id.* 3.1(d)(2). The regulations setting out his review authority do not expressly or by implication circumscribe the Attorney General's statutory decision-making authority. Thus, when the Attorney General reviews a case pursuant to 8 C.F.R. 3.1(h), he retains full authority to receive additional evidence and to make de novo factual determinations.[6]

Accordingly, there can be no doubt that the Attorney General has authority to consider evidence such as Mr. Trott's affidavit even though that evidence was not considered by the BIA or the immigration judge. Nor can there be any doubt that the Attorney General has authority to reach a decision different from that of the BIA. In any event, in this case respondent was notified that the Attorney General would consider Mr. Trott's affiadavit and was given an opportunity to respond on the merits to the

[6] Moreover, despite the contention of respondent, the regulations governing the BIA are not applicable to the Attorney General. Thus, even after having rendered a decision, if the Attorney General was presented with a motion to reconsider, or a motion to remand as the BIA was, he would not be governed by 8 C.F.R. 3.2 and 3.8 in deciding that motion.

facts and reasoning contained in it, an opportunity which respondent has exercised.[7]

III.

Respondent's actions and his criminal convictions were established by the district court in the extradition proceeding. *In Re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984). Respondent did not contest the factual findings of the court; indeed, he testified at length as to the events giving rise to his criminal conviction. *Id.* at 272. Respondent's

[7] On April 21, 1988, respondent filed a motion requesting that the Attorney General, and any individual to whom he might delegate decisionmaking authority, be recused from an adjudicative role in these proceedings. Respondent does not allege any personal bias as the basis for this motion. Rather, in essence the motion is based on the allegation that the history of the extradition litigation and these deportation proceedings demonstrates that the Justice Department is persecuting respondent by advancing improper legal theories and denying him procedural rights. This does not appear to be, in fact, a "recusal" motion; rather, the motion appears to me to be a repetition of legal arguments that respondent has made in these proceedings and elsewhere.

In any event, respondent's allegation is wthout foundation. The Justice Department has in no way persecuted respondent by advancing improper legal theories or denying him procedural rights. In this connection, I would note that, in an interim review of these proceedings, the United States Court of Appeals for the Second Circuit has already rejected a number of the claims that respondent makes in this motion. In particular, it held that it was "abundantly clear" that the INS had a reasonable basis for appealing the adverse decision of the immigration judge, and it also rejected the argument that the determination of the district court that respondent was not extraditable in some way precluded his deportation. *Doherty* v. *Meese*, 808 F.2d 938, 942, 944 (2d Cir. 1988). Accordingly, respondent's motion is denied.

testimony and his criminal convictions as established in the extradition proceeding are summarized in the opinion of the district court:

> Respondent Doherty was a member of the provisional Irish Republican Army ("PIRA"). On May 2, 1980, at the direction of the IRA, Doherty and three others embarked upon an operation "to engage and attack" a convoy of British soldiers.
>
> Doherty testified that he and his group took over a house at 371 Antrim Road in Belfast, and awaited a British Army convoy. Some three or four hours later, a car stopped in front of 371 Antrim Road and five men carrying machine guns emerged. These men, members of the Special Air Service of the British Army ("SAS"), and Doherty's group fired shots at each other.
>
> In the exchange of gunfire Captain Herbert Richard Westmacott, a British army captain, was shot and killed. Doherty was arrested, charged with the murder, among other offenses, and held in the Crumlin Road prison pending trial. On June 10, 1981, after the trial was completed but before any decision by the Court, Doherty escaped from the prison along with seven others. He was convicted in absentia on June 12, 1981 of murder, attempted murder, illegal possession of firearms and ammunition, and belonging to the Irish Republican Army, a proscribed organization.

599 F.Supp. at 272 (citations to transcript omitted).[8]

[8] Mr. Trott's affidavit states that respondent has committed certain additional crimes. Respondent states that he has not committed such crimes. I do not consider it necessary to resolve this factual dispute.

The facts established in the extradition proceedings show that respondent killed a member of the British army. While the victim was a soldier rather than a civilian, the use of violence against a democratic society is unjustified irrespective of the identity of the victim. It is unjustified for the fundamental reason that in a democratic society the political system is available for peaceful redress of grievances. Given the availability of peaceful alternatives, there is no legitimate reason to resort to violence against any person whether or not that person has an official status within the State.[9]

The availability of such alternatives cannot be questioned here. While in some cases the question whether a society is democratic would be a difficult one, it is clear that the United Kingdom (of which Northern Ireland is a part) is a democratic society. Its citizens have fundamental political rights and are fully able to pursue their political goals through the electoral process.

It is the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment. The factual premise of Mr. Trott's affidavit is that this policy would be prejudiced if respondent were deported to Ireland because, while he could be prosecuted there for any crimes he committed in connection with his escape from prison,

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The record of the extradition proceeding establishes the fact that respondent has committed serious crimes. I base my decision on the facts established in the extradition proceedings, and do not consider it relevant whether or not respondent has committed additional crimes.

[9] This, of course, is not to say that the United States may not also condemn acts of violence in a non-democratic state. In particular, it is the policy of the United States to condemn acts of violence directed against non-combatants even by those who are otherwise legitimately seeking to oppose a non-democratic government.

he could not be prosecuted there or extradited to the United Kingdom for murder or the other offenses he committed in connection with the ambush of the British army patrol. Trott Affidavit at 4-5, paragraphs 9, 11. This factual premise is challenged by respondent, who asserts that he would be subject to extradition from Ireland to the United Kingdom, apparently after having served any sentence Ireland would impose with respect to his escape from prison in the United Kingdom. Brief of Respondent-Appellee Joseph Patrick Thomas Doherty To The Attorney General at 24-25 (January 8, 1988).

Respondent apparently bases his statement that he would be subject to extradition from Ireland to the United Kingdom on the Extradition Act recently promulgated in Ireland.[10] Assuming for purposes of this decision that Irish law supports respondent's contention, it would nonetheless be prejudicial to the interests of the United States for respondent to be deported to Ireland rather than the United Kingdom for two independent reasons. First, respondent has committed serious crimes in the United Kingdom and has received a prison sentence in the United Kingdom. As indicated above, it is the policy of the United States that those who commit acts of violence against a democratic state should receive swift and lawful punish-

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[10] I note that the affidavit of counsel attached to the Motion of Respondent to Reopen or Reconsider (December 3, 1987), which as discussed in the next section of this opinion, was referred to me by the BIA, states that the Extradition (European Convention on the Suppression of Terrorism) Act went into effect in Ireland on December 1, 1987, and that it changed the Irish law governing deportation such that respondent would now be subject to extradition from Ireland to the United Kingdom. Affidavit of Mary Boresz Pike (December 3, 1987) at paragraphs 25-27.

ment, and it is thus in the interests of the United States that respondent serve his sentence in the United Kingdom. Deporting respondent to Ireland would require the United Kingdom to invoke Irish law to secure respondent's return to the United Kingdom. It is in our interest that he be sent directly to the United Kingdom instead.

Second, Michael H. Armacost, the Undersecretary for Political Affairs at the Department of State, has communicated to me the views of the Department of State that a decision to deport respondent to Ireland rather than the United Kingdom would be injurious to our relations with the United Kingdom. Mr. Armacost states:

> We note in particular that the United Kingdom is the only State which has requested Doherty's extradition from the U.S., and that the denial of that request by our courts met with great disappointment. Additionally, Her Majesty's Government has repeatedly and vigorously expressed its desire that the United States effect Doherty's deportation to the United Kingdom; to our knowledge, no other State has made a competing request. Therefore, in our view, the government and people of the United Kingdom would not welcome a decision by the Attorney General to deport Doherty elsewhere.
>
> Moreover, the United Kingdom is the United States' closest partner in our counter-terrorism efforts. Failure to return Doherty to the United Kingdom could undermine HMG['s] confidence in the ability of the United States to cooperate in counter-terrorism efforts of special bilateral concern.
>
> Finally, given the strength of British views on this issue, we believe that an Executive Branch determination not to deport Doherty to the U.K. might well prejudice broader aspects of our bilateral relationship beyond cooperation in counter-terrorism activities.

I certainly agree with the State Department that a decision to deport respondent to Ireland rather than the United Kingdom would be injurious to our relations with the United Kingdom.[11]

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[11] Respondent points to the fact that he was held unextraditable under the United States-United Kingdom Extradition Treaty. Brief of Respondent-Appellee at 3-4. Deportation proceedings such as these, however, are independent from, and governed by a different standard than, extradition proceedings. *Doherty* v. *Meese*, 808 F.2d 938, 944 (2d Cir. 1986). Application of the extradition treaty involves an interpretation of the reciprocal legal obligations created by that treaty; the application of 8 U.S.C. 1253(a) involves a determination of the interests of the United States—potentially a much broader inquiry. Thus, the fact that respondent's actions were held to fall within the political offenses exception to the then applicable extradition treaty between the United States and the United Kingdom does not preclude a finding that it would be prejudicial to the interests of the United states for respondent to be deported to Ireland.

Respondent also asserts that he has a substantive right to be deported to the country he designates, and that denial of that right would violate his constitutional right to due process and equal protection. Brief of Respondent-Appellee at 18-23. This latter claim is based on his assertion that he is the first alien whose country of designation has been rejected. Respondent is, of course, correct that 8 U.S.C. 1253(a) authorizes an alien to designate a country of deportation, but he fails to acknowledge that the statutory authorization is subject to the authority of the Attorney General to reject the designated country. Nor has he been singled out unconstitutionally. In the analogous area of decisions whether or not to exercise prosecutorial discretion, a decision to prosecute is only unconstitutional if it is based on a characteristic such as race or religion. *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962); *Wayte* v. *United States*, 470 U.S. 598, 608, (1985). Respondent does not assert that he has been singled out based on such a characteristic, nor would there be any grounds for him to do so.

For the foregoing reasons, I conclude that deportation of respondent to Ireland would be prejudical to the interests of the United States and that he should be deported instead to the United Kingdom. Accordingly, I disapprove the decision of the BIA affirming the order of the immigration judge that respondent be deported to Ireland rather than the United Kingdom.[11]

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[12] My decision on the merits is based on the evidence and reasoning set forth in Part III of this opinion. I express no opinion regarding the BIA's decision, pursuant to 8 C.F.R. 3.2 and 3.8, to deny INS's Motion to Supplement the Record or to Remand for Further Proceedings Before the Immigration Judge. I do, however, disapprove of the BIA's statement that Mr. Trott's affidavit consisted soley of "logical inferences" and thus was not "evidence." May Decision at 5. The judgment under 8 U.S.C. 1253(a) whether an alien's designation of a country of deportation would be prejudicial to the interest of the United States "must be based on an analysis of the impact of a particular deportation on United States' interests viewed as a whole by a politically responsible official." *Doherty* v. *Meese, supra,* 808 F.2d at 943. Such an analysis is likely to take the form of an affidavit such as Mr. Trott's. Indeed, it is difficult to see what other kind of evidence could be offered. Certainly, the INS should not be required, for instance, to offer the affidavits of foreign government officials stating what the official position of their governments would be regarding a particular deportation, and stating whether they will lessen their cooperation with the United States as a result of the deportation proceeding.

Finally, I approve of the decision of the BIA that the immigration judge, in the circumstances of this case, did not abuse his discretion in refusing to let the INS prove additional charges. This refusal in no way impaired the INS's ability to establish that it would be prejudicial to the interests of the United States for respondent to be deported to Ireland. As the BIA stated: "Deportability and designation of the country for deportation are separate and distinct issues." March Decision at 5. Once deportability is established on any ground, as it was here, the INS can proceed to establish its objections to the country of

On December 3, 1987, respondent filed a motion with the BIA requesting an order reopening the deportation proceedings, and remanding the case to the immigration judge for a hearing on respondent's claims for asylum, withholding of deportation, and for redesignation of country of deportation. It appears that respondent's arguments are twofold: first, that the enactment of the Extradition Act in Ireland has changed the facts upon which he based his earlier concession of deportability and his waiver of other legal claims; and second, that because the prolongation of the administrative proceedings prevented him from being deported to Ireland prior to the entry into force of this law, he should be allowed now to revoke his earlier concession and waiver.

On February 2, 1988, the BIA issued a per curiam opinion refering respondent's motion to the Attorney General. BIA Opinion of February 2, 1988, at 2. In its opinion, the BIA stated it was taking this action because it was unclear whether it had authority to consider the motion while an appeal was pending before the Attorney General. Accordingly, the opinion referred the motion to the Attorney General "for such action as he deems appropriate." *Id.*

I have concluded that it is appropriate to remand this motion to the BIA for its decision. I express no opinion as to how the BIA should decide the motion, or as to how the immigration judge or the BIA should make any subsequent determinations in the event that all or part of that motion were to be granted. In light of the length of time that the respondent's deportation proceedings have already consumed, however, I do recommend that the BIA

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designation under 8 U.S.C. 1253(a). Of course even in circumstances similar to those here, the INS must be given the opportunity to prove when necessary additional *facts* that are relevant to its objection to a country of designation, but that need not be done by proving additional grounds of deportability.

give priority on its docket to this motion to the extent that, in the BIA's judgment, this can be done consistent with any applicable procedural rules and the reasonable requirements of the parties.

V

For the foregoing reasons, the decision of the BIA is disapproved, and the case is remanded to the BIA for proceedings consistent with this opinion.

/s/ EDWIN MEESE III
Edwin Meese III
Attorney General

Date: June 9, 1988

APPENDIX E

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A26 185 231 – New York

Date: Feb. 2, ____

IN RE: JOSEPH PATRICK THOMAS DOHERTY

IN DEPORTATION PROCEEDINGS
APPEAL

On behalf of respondent: Mary Boresz Pike, Esquire
Somerstein & Pike
401 Broadway, 27th Floor
New York, New York 10013

On behalf of service: J. Scott Blackman
Assistant District Director

CHARGES:

Order: Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(9), I&N Act [8 U.S.C. § 1182(a)(9)] – Crime involving moral turpitude

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(10), I&N Act [8 U.S.C. § 1182(a)(10)) – Convicted of two or more crimes with aggregate sentences of confinement of five years or more

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(19), I&N Act [8 U.S.C. § 1182(a)(19)] – Entered by fraud or willful misrepresentation of a material fact

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(20) – I&N Act [8 U.S.C. § 1182(a)(20)] – No valid immigrant visa

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(27), I&N Act [8 U.S.C. § 1182(a)(27)] – Entered to engage in activities prejudicial to the public interest

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(28)(F), I&N Act [8 U.S.C. § 1182(a)(28)(F)] – A member of an organization that teaches the duty or necessity of unlawfully assaulting or killing of officers of an organized government.

Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] – In the United States in violation of law

APPLICATION: Reopening

ORDER:

PER CURIAM. The respondent, through counsel, moves this Board to order the reopening of deportation proceedings before the immigration judge to provide him the opportunity to apply for asylum and withholding of deportation and to permit the redesignation of the country of deportation. The Board's May 22, 1987, decision in this case, however, is presently under review by the Attorney

General under the provisions of 8 C.F.R. § 3.1(h)(1)(iii). It is unclear whether the Board has authority to consider a motion to reopen under these circumstances. This is particularly true where the motion involves issues that may be related to those under consideration by the Attorney General (*e.g.*, the request to reopen proceedings to permit the redesignation of the country of deportation). Accordingly, consideration of this motion will not be undertaken by the Board and the motion and Service's response will be forwarded to the Attorney General for such action as he deems appropriate. Respondent's request to the Board for time within which to submit a response to the Service's reply brief will be included in the record.

/s/ DAVID L. MILHOLLAN
Chairman

APPENDIX F

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A26 185 231 – New York

Date: ____ 22, ____

IN RE: JOSEPH PATRICK THOMAS DOHERTY

IN DEPORTATION PROCEEDINGS
MOTION

On behalf of respondent: Mary Boresz Pike, Esquire
Somerstein & Pike
401 Broadway, 27th Floor
New York, New York 10013

On behalf of service: J. Scott Blackman
Assistant District Director

CHARGE:

Order: Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(19), I&N Act [8 U.S.C. § 1182(a)(19)] – Entered by fraud or willful misrepresentation of a material fact

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(20) – I&N Act [8 U.S.C. § 1182(a)(20)] – No valid immigrant visa

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(9), I&N Act [8 U.S.C. § 1182(a)(9)] – Crime involving moral turpitude

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(10), I&N Act [8 U.S.C. § 1182(a)(10)) – Convicted of two or more crimes with aggregate sentences of confinement of five years or more

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(27), I&N Act [8 U.S.C. § 1182(a)(27)] – Seeking to enter to engage in activities prejudicial to the public interest

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(28)(F), I&N Act [8 U.S.C. § 1182(a)(28)(F)] – A member of an organization that teaches the duty or necessity of unlawfully assaulting or killing of officers of an organized government.

Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] – In the United States in violation of law

APPLICATION: Remand

This case is before us on motion of the Immigration and Naturalization Service (hereafter the Service) to reopen its appeal for consideration of its March 4, 1987, Motion to Supplement the Record or to Remand for Further Proceedings Before the Immigration Court. We will reopen the appeal on our own motion to consider the Service's motion to remand of March 4, 1987. The motion will be denied and our order of March 11, 1987, will be affirmed.

The facts and history of this case are set forth in our order of March 11, 1987, and will not be repeated here except as necessary for this decision. The respondent is a citizen of the Republic of Ireland and the United Kingdom of Great Britain. He has a long record of association with the Provisional Irish Republican Army (PIRA), and has a number of criminal convictions. On May 2, 1980, while on a mission for the PIRA, he was involved in a gun battle during which a British Army captain was killed. The respondent was tried and convicted for murder, attempted murder, possession of firearms and ammunition, and belonging to a proscribed organization. He was sentenced to two terms of life imprisonment plus 30 years. On June 10, 1981, he escaped from custody using weapons that had been smuggled into the jail. He entered the United States in February of 1982 using a passport in the name of Henry J. O'Reilly. The Government of Great Britain attempted to extradite him, but the United States District Court of the Southern District of New York denied extradition.[1]

At a hearing on September 12, 1986, the respondent admitted a number of the allegations against him, conceded deportability on 2 of the charges, and designated the Republic of Ireland as the country of deportation. The Service objected to the respondent's designation of the country of deportation. It contended that deportation to the Republic of Ireland was improper as it would be prejudicial to the interests of the United States within the meaning of section 243(a) of the Act, 8 U.S.C. § 1253(a), as it may interfere with the United States' international efforts to combat terrorism.

The immigration judge granted the Service 2 continuances to allow it to obtain evidence to support its objections. The Service indicated that this matter was of concern at the highest levels of government (Tr. at 47). However, when the hearing reconvened on September 19, 1986, the Service had nothing further to submit. The immigration judge entered his decision, and the Service appealed. In an order dated March 11, 1987, we dismissed the Service's appeal.

[1] The history of the litigation in this case is set forth in our order of March 11, 1987.

However, on March 5, 1987, prior to our decision, the Service submitted a MOTION TO SUPPLEMENT THE RECORD OR TO REMAND FOR FURTHER PROCEEDINGS BEFORE THE IMMIGRATION COURT (hereafter motion to remand). Due to administrative error, that motion was not included in the record and was not considered by the Board. Therefore, we will reopen on our own motion and now consider the Service's motion to remand.

As it was filed while the appeal was pending before the Board, the Service's motion is a motion to remand. In reviewing motions to remand, we apply the standards applicable to motions to reopen. The regulations provide that a motion to reopen "shall *not* be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. . . ." 8 C.F.R. § 3.2. The motion "*shall state the new facts* to be proved at the reopened hearing and *shall* be supported by affidavits or other evidentiary material." 8 C.F.R. § 3.8 (emphasis supplied). The motion will not be granted "when a *prima facie* case of eligibility for the relief sought has not been established." *INS* v. *Wang,* 450 U.S. 139 (1981); *Matter of Martinez-Romero,* Interim Decision 2872 (BIA 1981); *Matter of Radriguez,* 17 I&N Dec. 105 (BIA 1979); *Matter of Lam,* 14 I&N Dec. 98 (BIA 1972). *See Matter of Sipus,* 14 I&N Dec. 229 (BIA 1972).

The Service wishes to offer into evidence an affidavit sworn on February 19, 1987, by Stephen S. Trott, Associate Attorney General of the United States. The Service contends that this affidavit is newly obtained evidence which provides a basis for the Board to find that the respondent's deportation to the Republic of Ireland would be prejudicial to the interests of the United States.

There are two aspects of this case that deserve special comment. The first is raised in the dissenting opinion in which it is stated that this Board does at times apply a generous standard in considering motions to reopen in visa petition cases. This is both true and hardly remarkable as the provisions of the immigration law relating to visa petitions require the Attorney General to approve an immigrant visa petition if the petitioner establishes eligibility. Section 204 of the Immigration and Nationality Act, 8 U.S.C § 1154. In such instances, the Board may be confronted with a situation in which, for reasons of administrative economy, it is far more efficient to remand the case, than to force the petitioner to file a new visa petition.

The motion to reopen under consideration here neither involves a visa petition, nor, to be quite frank, a typical deportation case. The Service wishes to reopen the proceedings to establish that Mr. Doherty's deportation to the Republic of Ireland would be prejudicial to the interests of the United States. This objection to the country of deportation designated by the immigration judge is highly unusual, even exceptional, as that word is commonly understood. The objection was apparently first raised on September 3, 1986, when Mr. Doherty indicated that he would concede his deportability and withdraw his applications for relief. At that time, the Service indicated that it needed more time to obtain an authoritative statement from a high government official which would establish the prejudice which might result from the designation of the

Republic of Ireland. Subsequently, on September 12, 1986, the Service reiterated, with some emphasis, that Mr. Doherty's case was enjoying the attention of certain high officials in the United States Government, including the Attorney General. In the case of the latter, the Service stated unequivocally that Mr. Doherty would receive the personal attention of the Attorney General that "coming week." September 12, 1986, (Tr. at 47).

On September 19, 1986, the Service informed the immigration judge that it had not been able to obtain any statement from a high official relating to Mr. Doherty, although the case was still "under review at the highest levels of the Justice Department." September 19, 1986, Tr. at 57. The immigration judge, satisfied that the hearing had been continued long enough, entered his decision finding Mr. Doherty deportable and ordering him deported to the Republic of Ireland. The Service appealed this decision to the Board, which dismissed the appeal on March 11, 1987.

We now have before us a motion to reopen based on a February 19, 1987, affidavit by the Associate Attorney General. He states his opinion that Mr. Doherty's deportation to the Republic of Ireland would be prejudicial to the interests of the United States because it is the policy of the United States to oppose terrorism.

The respondent contends that the motion must be denied because it does not establish that the evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. 8 C.F.R. §§ 3.2 and 3.8; *Wang* v. *INS, supra. Matter of Reyes,* 18 I&N Dec. 249 (BIA 1982); *Matter of Martinez-Romero, supra.* The respondent contends that the regulations apply with equal force when it is the Service that desires reopening. *Ramon-Sepulveda* v. *INS,* 743 F.2d 1307 (9th Cir. 1984).

While there is no reason to treat the Associate Attorney General's statement lightly, the fact remains that the regulations under which this Board operates do not distinguish between government officials and private parties, as the respondent correctly contends. The Service's motion must be treated in the same manner as a motion filed by a respondent. If Mr. Doherty, for instance, were presently trying to change his designation of the country of deportation 5 months after he had made it, presumably the Service would be arguing vociferously that he would have to show that his motion was based on evidence previously unavilable or unknown.

In stating this premise, the Board is not adopting a mechanistic approach to the motion to reopen, it is applying a consistent approach. The Service has failed to establish that the affidavit from the Associate Attorney General was unavailable before February 19, 1987. Indeed, the Service's motion is completely silent as to the reasons for its submission at this late date. This is an especially telling omission in light of the fact that the Service had repeatedly represented to the immigration judge that Mr. Doherty's case was of great interest and under review at high government levels in September 1986. The glacial pace at which any tangible proof of this interest was produced seems to belie any sense of urgency or responsibility on the part of the government to proceed promptly in this case.

Therefore, we agree with the respondent that the Service's motion must be denied because of its failure to comply with the regulations. In this case, not only is there nothing showing that the proffered evidence was not available and could not have been discovered or presented at the hearing, but the affidavit is premised in part upon testimony given before a Senate committee in 1985.

Moreover, the affidavit does not purport to be based upon evidence that the respondent's deportation to the

Republic of Ireland will be prejudicial to the United States' interests. Rather, it appears to be based only upon the same logical inference argued by the Service at the hearing. The mere possibility that our allies will view the respondent's deportation to the Republic of Ireland as shielding a terrorist from punishment was of record when we reached our prior decision.

The second subject which bears further discussion is whether the Service should have been reasonably on notice that Mr. Doherty might designate the Republic of Ireland as the country of deportation. This is directly pertinent to the reasonableness of the Service's delay in obtaining the affidavit of prejudice. A review of the record shows that on February 25, 1985, Mr. Doherty asserted vehemently that he was a citizen of the Republic of Ireland, not of Great Britain. February 25, 1985, Tr. at 3. This unequivocal assertion was made approximately 18 months before Mr. Doherty conceded his deportability. It is obvious that the Service was on notice of Mr. Doherty's claim of citizenship for a substantial period of time. It should have been prepared to contest his designation of the Republic of Ireland before the September 5, 1986, hearing. Therefore, we also deny the motion in the exercise of discretion based upon the extraordinary delay in producing the affidavit and the Service's lack of preparation for the hearing.

Accordingly, the following orders will be entered.

ORDER: The proceedings are reopened for consideration of the Service's motion.

FURTHER ORDER: Upon further consideration, the Service's Motion to Supplement the Record or Remand for Further Proceedings Before the Immigration Court is denied.

FURTHER ORDER: The Board's prior order of March 11, 1987, is affirmed.

/s/ MARY MAGUIRE DUNNE
Acting Chairman

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A26 185 231 – New York

Date: _____

IN RE: JOSEPH PATRICK THOMAS DOHERTY

DISSENTING OPINION: JAMES P. MORRIS, Board Member

I respectfully dissent.

The majority denies the motion of the Immigration and Naturalization Service to remand because of (1) the Service's failure to comply with the regulations by showing that the affidavit by the Associate Attorney General now proffered was unavailable and could not have been discovered or presented at the hearing; and (2) it does not appear that the Associate Attorney General's opinion is based on evidence. Because I disagree with these reasons, I dissent.

In our order of March 11, 1987, we dismissed the Service's appeal because it produced no evidence that the respondent's deportation to the Republic of Ireland would be prejudicial to the interests of the United States under section 243(a) of the Immigration and Nationality Act, 8 U.S.C. § 1253(a). The Service has now offered such evidence in the form of an affidavit in which the Associate Attorney General states that it is the policy of the United States that those who commit terrorist offenses should not escape due punishment through international flight. He notes that the respondent has been convicted of terrorist offenses for which he will not be punished if deported to the Republic of Ireland. He states that the United States is

currently encouraging several foreign countries to arrest and surrender to us persons accused of acts of terrorism against citizens of the United States, including Abu Abbas, the mastermind of the *Achille Lauro* incident. He concludes that it would be prejudicial to the interests of the United States to be perceived as aiding a person who has committed terrorist offenses to escape punishment.

In *Doherty* v. *Meese,* 808 F.2d 938 (2d Cir. 1986), the United States Court of Appeals held that the decision whether to deport Doherty to the Republic of Ireland necessarily implicates the national interests of the United States and affects not only the relations of the United States with the United Kingdom and the Republic of Ireland, but also complicates multilateral negotiations to halt international terrorism. The Court further observed that the decision whether a respondent's deportation to a country designated by him would be prejudicial to the interests of the United States must be based on an analysis of the impact of a particular deportation on United States interests viewed as a whole by a politically responsible official.

The Associate Attorney General is a politically responsible official and is in a position to make this basically political determination. The Office of International Affairs in the United States Department of Justice is responsible for formulating and supervising the execution of international criminal justice enforcement policies and procedures. It also participates in the negotiation of international agreements and treaties relating to criminal law enforcement. This office reports through the Criminal Division to the Associate Attorney General. See the Annual Report of the Attorney General of the United States (1985) at pp. iv and 73-82. I find the Associate Attorney General's affidavit to be authoritative, material, and dispositive of the issue of whether the respondent's deportation to the Republic of Ireland would be prejudicial to the interests of the United States.

I believe that the majority has become entangled in the requirements of motion practice unnecessarily. The Board has already reopened these proceedings because of an administrative error. Therefore, the entire spectrum of options available to it in reviewing the appeal are again available. The Board is authorized by 8 C.F.R. § 3.1(d)(2) to return a case to the immigration judge for such further action as may be appropriate without entering a final decision on the merits of the case. It is clear, therefore, that the Board has considerable discretion in seeking to attain justice based upon its knowledge of available evidence. *Tandaric* v. *Robinson,* 257 F.2d 895 (7th Cir.), *reh'g denied* (1958). In *Matter of Martinez-Solis,* 14 I&N Dec. 93 (BIA 1972), the Board noted that a deportation proceeding is a quest for truth involving high stakes. It rejected the "sporting theory of justice" and affirmed its prior order remanding the case to the immigration judge for additional evidence. Further, it is not uncommon for the Board to remand a case for correction of an error or to allow submission of additional evidence or for consideration of some form of discretionary relief from deportation. The Board frequently remands visa petition cases on the basis of evidence submitted on appeal without a showing that the evidence could not have been discovered or presented in the proceedings before the district director. I do not recall any visa petition case which implicated national interests of the United States. However, this is a very significant case and important national interests are obviously involved. Moreover, additional material evidence is available. Therefore, I would remand on the Board's own motion for inclusion of the Associate Attorney General's affidavit.

Even assuming that motion standards are applicable here, I question the majority's decision to deny the motion for lack of a showing of the unavailability of the proffered affidavit. The record does not reflect that the Service was at fault in failing to obtain the affidavit. Despite two short continuances, the Service actually had only a few days in which to secure evidence in opposition to the respondent's designation of the Republic of Ireland as the country of deportation. The first indication in the record that the respondent would concede deportability and designate the Republic of Ireland as the country of deportation appears in the record of hearing for September 12, 1986, only 7 days before the immigration judge rendered his decision. Previousiy, the respondent had contested the government's every move against him. It is not surprising that the Service was unable to secure an affidavit from the Office of the Attorney General on such short notice. In any event, by now refusing to accept the affidavit on the ground that it could have been made available earlier, the majority appears to equate the Service with the Associate Attorney General and to punish the former because the latter did not act more expeditiously. Moreover, the potential damage here is not to the Service or the Associate Attorney General but is to United States' efforts to combat terrorism internationally. As the Associate Attorney General's affidavit did not exist before February 19, 1987; was not available to the Service until March 3, 1987; and was timely submitted by the Service on March 5, 1987; I would hold that the evidence was unavailable.

Accordingly, I would remand the case for receipt and consideration of the Associate Attorney General's affidavit on the Board's own motion, or in the alternative, I would grant the Service's motion to remand. At the remanded proceeding both the respondent and the Service

should be permitted to offer additional evidence and argument as to which country deportation should be directed.

/s/ JAMES P. MORRIS
James P. Morris
Board Member

I concur in the foregoing dissenting opinion.

/s/ DAVID L. MILHOLLAN
David L. Milhollan
Chairman

APPENDIX G

United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, Virginia 22041

File: A26 185 231 – New York

Mar. 11, 1987

IN RE: JOSEPH PATRICK THOMAS DOHERTY

IN DEPORTATION PROCEEDINGS
APPEAL

On behalf of respondent: Mary Boresz Pike, Esquire
Somerstein & Pike
401 Broadway, 27th Floor
New York, New York 10013

On behalf of Service: J. Scott Blackman
Assistant District Director,
Deportation

Oral Argument: February 11, 1987

CHARGES:

Order: Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(19), 8 U.S.C.

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(20), 8 U.S.C.

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(9)

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(10)

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(27)

Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] – Excludable at entry under section 212(a)(28)(F)

Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] – In the United States in violation of law

APPLICATION: Remand

In a decision dated September 19, 1986, an immigration judge found the respondent deportable under section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1), as one excludable at entry under section 212(a)(20) of the Act, 8 U.S.C. § 1182(a)(20), for lack of a valid visa. The immigration judge also found the respondent deportable under sections 241(a)(1) and 212(a)(19) of the Act (Tr. at 39-40), but did not include that charge in his order. As the respondent conceded deportability for being excludable at entry under sections 212(a)(19) and 212(a)(20) and as we find that the finding of deportability on the 212(a)(19) charge was inadvertently omitted from his decision by the immigration judge, we find him excludable on that charge as well. The Immigration and Naturalization Service has appealed. The appeal will be dismissed.

The respondent is a 32-year-old single male, a native and citizen of the Republic of Ireland and the United Kingdom of Great Britain. He entered the United States in February of 1982 by presenting an Irish passport issued in the name of Henry J. O'Reilly and containing a United States non-

immigrant visa. he misrepresented himself to be Henry J. O'Reilly when he was in fact Joseph Patrick Thomas Doherty. He was taken into custody by the Service on June 17, 1983, and an Order to Show Cause was issued that day charging him with deportability under section 241(a)(2) of the Act for being in the United States in violation of law. However, custody was thereafter transferred to the United States Marshal's Service while the respondent was under proceedings to extradite him to the United Kingdom.

On December 12, 1984, Judge John E. Sprizzo denied extradition *In re Doherty,* 599 F. Supp. 270 (S.D.N.Y. 1984). The respondent was returned to the custody of the Immigration and Naturalization Service. An immigration judge set bond for the respondent's release at $200,000. However, we sustained the Service's appeal from that decision and ordered the respondent held without bond. On February 25, 1985, the Service lodged 6 additional charges of deportability. In early 1985 the Government sought collateral review of the decision denying extradition. On June 25, 1985, the Government's suit for a declaratory judgment was dismissed. *United States* v. *Doherty,* 615 F. Supp. 755 (S.D.N.Y. 1985). On March 13, 1986, that dismissal was affirmed by the United States Court of Appeals for the Second Circuit. A petition for rehearing was denied on June 2, 1986. *United States* v. *Doherty,* 786 F.2d 491 (2nd Cir. 1986). A petition for habeas corpus through which the respondent sought to compel his deportation was denied and then affirmed on appeal. *Doherty* v. *Meese,* 808 F.2d 938 (2nd Cir. 1986).

When the Government did not petition the Supreme Court for review in *United States* v. *Doherty, Id.,* within 90 days as permitted by 28 U.S.C. § 2101(c), the respondent advised the immigration judge that he wished to consent to deportation and withdraw his application for discretionary relief from deportation. A conference was held in connection with the deportation case on September 5, 1986. At a hearing on September 8, 1986, the Service requested a continuance, which was granted by the immigration judge. A hearing on the merits of the case was held on September 12, 1986. The respondent admitted allegations 1, 2, and 4 through 10[1] and conceded deportability (Tr. at 33-36). The respondent withdrew his application for asylum, made clear that he was requesting no relief from deportation (Tr. at 38), and designated the Republic of Ireland as the country of deportation.

The Service objected, stating that it desired to go forward and prove all the allegations and charges in the Order to Show Cause. It also objected to the respondent's designation of the Republic of Ireland as the country of deportation on the ground that the respondent's deportation there would be prejudicial to the interests of the United States. The Service took the position that the respondent was a member of the Provisional Irish Republican Army (PIRA), a terrorist organization, with a criminal record including convictions for the murder of a British Army officer, jail breaking, possession of a weapon, and membership in a proscribed organization, the PIRA. The Service contended that it should be allowed to prove all these facts to complete the record. The immigration judge saw no purpose to be served in allowing the Service to prove the remaining allegations and charges and refused to allow it.

In support of its contention that the respondent's deportation to the Republic of Ireland would be prejudicial to the interests of the United States, the Service submitted as background information several documents including a copy of a speech by Secretary of State Shultz on October 25, 1984; a statement by Abraham D. Sofaer, Legal Ad-

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[1] Allegation 3 was superceded by allegation number 5.

viser, Department of State, given before the Senate Committee on Foreign Relations on August 1, 1985; and two newspaper articles. The attorney for the Service also advised that this matter is of concern at the highest levels of government and that it was under consideration at the Department of State and that Attorney General would personally review it the following week (Tr. at 47).

Over the respondent's objections, the immigration judge granted the Service a continuance until September 19th to allow it to produce evidence in support of its contention that the respondent's deportation to the Republic of Ireland would be prejudicial to the United States' interests.

The hearing was reconvened on September 19, 1986, and the Service advised that it had nothing further to submit. The immigration judge rendered his decision and the Service submitted a timely appeal. The respondent moved to have the record forwarded to the Board without a transcript and for summary dismissal of the appeal. *Matter of Torre,* Interim Decision 2954 (BIA 1984). On October 30, 1986, the immigration judge denied the motion to forward the appeal without a transcript and we deny the motion for summary dismissal.

On appeal, the Service contends that the immigration judge erred in refusing to allow the Service to adduce evidence and prove each and every allegation and charge in the Order to Show Cause. The Service contends that the allegations and charges are matters within the Service's prosecutorial discretion which neither the immigration judge nor this Board can review. *Lopez-Telles* v. *INS,* 564 F.2d 1302 (9th Cir. 1977); *Matter of Quintero,* 18 I&N Dec. 348 (BIA 1982); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503 (BIA 1980); *Matter of Marin,* 16 I&N Dec. 581 (BIA 1978); *Matter of Merced,* 14 I&N Dec. 644 (BIA 1974); *Matter of Geronimo,* 13 I&N Dec. 680 (BIA 1971).

The Service also contends that the immigration judge erred in accepting the respondent's designation of the Republic of Ireland as the country for deportation. The Service submits that section 243(a) of the Act does not compel a decision that Doherty must be deported to the country of his choice. It is contended that the designation of the Republic of Ireland as the country of deportation has serious foreign policy implications for the United States. The Service states that in Ireland the respondent would face possible prosecution for his escape from jail, but not for his other offenses due to double jeopardy type provisions of Irish law. Further, he may be in a position to engage in further terrorist activities. The Service also submits that the respondent's deportation to the Republic of Ireland may well adversely impact our relations with other nations, especially the United Kingdom, with whom we have pledged mutual support in the fight against worldwide terrorism. It is contended that deportation of a terrorist convicted of murder to a country where he will escape the full consequences of his acts is certainly "prejudicial to the interest of the United States" within the meaning of section 243(a) of the Act (INS brief on appeal, p. 22).

The Service also contends that it was not permitted to prove that the respondent is a member of the PIRA; that he has been convicted of murder of a British Army officer and other violent offenses; that he escaped from lawful custody by force and violence and that he is currently the subject of outstanding warrants of arrest. The Service contends that the record is incomplete for a decision on whether the respondent's deportation to the Republic of Ireland is prejudicial without proof of these facts.

We find the Service's contentions to be without merit. An immigration judge is not empowered to review the Service's exercise of its prosecutorial discretion, but he is

not obligated to allow the Service to waste valuable time and resources proving superfluous charges and allegations. A respondent is no more deportable on 7 charges than on two. Therefore, after a respondent's deportability has been established, it is within the sound discretion of the immigration judge whether to allow the Service to submit additional evidence or arguments relevant to other charges or allegations. In this case, the respondent admitted 9 allegations of fact in the Order to Show Cause and conceded deportability on two charges. Further, he stated that he was applying for no relief from deportation. The immigration judge saw nothing to be gained from proof of additional charges of deportability and, despite the Service's appeal, neither do we.

The contention that proof of these additional charges was necessary for an informed decision on the Service's objection to the country of deportation designated by the alien is confusing. Deportability and designation of the country for deportation are separate and distinct issues. Further, the immigration judge gave the Service at least two continuances to prepare its case after the respondent had disclosed his position. The Service never offered any evidence relating to these matters in connection with its objection.

Turning now to the respondent's designation of the Republic of Ireland as the country of deportation, section 243(a) of the Act, 8 U.S.C. § 1253(a), in pertinent part provides:

> The deportation of an alien in the United States . . . shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States . . .

The statute bestows upon a respondent the right to designate the country of deportation and this right is a substantive right. *Rodriguez-Agustin* v. *INS*, 765 F.2d 782 (9th Cir. 1985).

The respondent contends that an alien's designation of a country has never been rejected on the ground that deportation to that country would be prejudicial to the interests of the United States. The Service has not contested this assertion and we find no instance where it has happened. Although the statute authorizes rejection of the respondent's designation of the country for deportation, we are unwilling to find that deportation to the Republic of Ireland would be prejudicial to the interests of the United States in the absence of clear evidence to support that conclusion. The Service was granted a continuance to allow it to secure evidence of such interest, but it has produced none. The Service's trial attorney in effect placed himself in the role of testifying on this issue. The trial attorney's argument, however, is not evidence and there is nothing of record to reflect that the respondent's deportation to the Republic of Ireland would be prejudicial to the interests of the United States.

Accordingly, the Service's appeal will be dismissed.

ORDER: The appeal is dismissed.

/s/ DAVID L. MILHOLLAN
Chairman

APPENDIX H

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
New York, New York

File: A26 185 231

September 19, 1986

IN THE MATTOR OF: JOSEPH PATRICK THOMAS DOHERTY,
AKA JOSEPH REILLY, RESPONDENT

IN DEPORTATION PROCEEDINGS

ON BEHALF OF RESPONDENT:
Law firm of Pike and Somerstein
401 Broadway
New York, New York 10013
Mary Pike, Esquire of Counsel
Stephen Somerstein, Esquire of Counsel
Arthur Helton, Esquire of Counsel

ON BEHALF OF SERVICE:
Scott Blackman, Esquire
Allen Page,
Esquire of Counsel/INS
New York, New York 10278

CHARGE: Sec. 241(a)(1), in that at time of entry not in possession of any valid document by which to enter under Sec. 212(a)(20) of the Act.

APPLICATION: No application for relief.

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a male alien, a native of Northern Ireland and a citizen of the United Kingdom and Colonies. He entered the United States on or about February, 1982 and presented the passport of the Republic of Ireland issued in the name of Henry J. O'Reilly containing a U.S. non-immigrant visa. He misrepresented himself to be one Henry J. O'Reilly, when in truth and fact he was one Joseph Patrick Thomas Doherty; and it was conceded that he was not in possession of any valid immigrant visa or any entry document for permanent residence and it was his intention to remain indefinitely in the United States. He conceded his deportability and designated Eire as the country of deportation. The Service wished, as an alternate, the United Kingdom and Colonies to which the alien's representation had no objection.

The original Order to Show Cause was received in evidence on February 25, 1985 as Exhibit 1. On that same date additional allegations of deportability and charges of deportability were submitted and received in evidence as Exhibit 2. Contained in Exhibit 2 were allegations five through sixteen. The alien conceded the truth of allegations five through ten in addition to allegations one and two on the original Order to Show Cause (Exhibit 1). The alien conceded his deportability based on his concessions of the truth of allegations one, two, five through ten. In view of the fact that deportability was conceded the alien was prepared to designate a country of deportation. In order not to prolong the hearing and extend the record, I did not permit the Service to introduce any evidence on allegations eleven through sixteen.

The Service, in designating the United Kingdom and Colonies, placed the alien in the position of submitting an asylum application which apparently had been previously

considered by the Service, but, no such application was to be renewed before me. The alien's attorneys solely wished that the alien be deported to Eire; a designation of country which is permitted under Section 243(a) of the Immigration and Nationality Act.

The Service has tried to delay a decision by me, which seems relatively simple because the Service believes that it is not in the best interests of this country to deport the alien to Eire. The Service offered no actual evidence on this point but presented certain documents which I considered as part of a brief furnished to me as to why terrorism in the world is against the best interests of the United States and that this country should be protected against terrorism (Exhibit A). It was agreed by all parties that the lettered Exhibits would not be considered evidentiary and only the numbered Exhibits as such.

I've carefully reviewed the materials submitted by both parties, marked Exhibits A through E and am convinced that neither side has offered any evidence that Eire is a country which is opposed to the doctrine that was stated by the Service attorneys that world terrorism is inimical to their best interests. I assume that the Service, which asked for several adjournments to produce such evidence, would have presented that before me today, which I felt was a most reasonable period of time which the Government could have to present such evidence. I can find nothing in Section 243(a) or any other part of the Immigration and Nationality Act which would require me to render any decision other than to direct the alien's deportation to the country he designated, which right he has under Section 243(a). And there was nothing to indicate that the Attorney General believes that this is inimical to the best interests of the United States. No evidence was offered on that point.

ORDER

IT IS ORDERED that the respondent be deported to Eire on the charge contained in the Order to Show Cause.

IT IS FURTHER ORDERED that if Eire advises the Attorney General that it is unwilling to accept respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept respondent into its territory, respondent shall be deported to the United Kingdom and Colonies.

/s/ Howard I. Cohen
HOWARD I. COHEN,
Immigration Judge

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

88-4084, -4092

JOSEPH PATRICK DOHERTY, PETITIONER

v.

U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

[Filed June 29, 1990]

Present: HON. J. EDWARD LUMBARD, HON. WILFRED FEINBERG, and HON. GEORGE C. PRATT, *Circuit Judges.*

A petition for review of orders of the Attorney General of the United States.

This cause came to be heard on the certified list of items comprising the record and was argued by counsel.

UPON CONSIDERATION THEREOF, it is ordered, adjudged and decreed that the Petitions for review be and they hereby are granted in part, denied in part and remanded to the Board for further proceedings, consistent with the opinion of this Court.

ELAINE B. GOLDSMITH,
Clerk

/s/ Edward J. Guardaro

By: EDWARD J. GUARDARO,
Deputy Clerk

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Number 88-4084

JOSEPH PATRICK DOHERTY, PETITIONER

v.

U.S. DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

[Filed Sep. 13, 1990]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Respondent U.S. Department of Justice.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH,
Clerk

/s/ Tina Eve Brier

By: TINA EVE BRIER,
Chief Deputy Clerk

APPENDIX K

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 101(a)(42) of the Immigration and Nationality Act, as codified at 8 U.S.C. 1101(a)(42), provides:

§ 1101. Definitions

(a) As used in this chapter–

* * * * *

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

* * * * *

2. Section 208 of the Immigration and Nationality Act, as codified at 8 U.S.C. 1158, provides:

§ 1158. Asylum procedure

(a) Establishment by Attorney General; coverage

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101 (a)(42)(A) of this title.

(b) Termination of asylum by Attorney General; criteria

Asylum granted under subsection (a) of this section may be terminated if the Attorney General, pursuant to such regulations as the Attorney General may prescribe, determines that the alien is no longer a refugee within the meaning of section 1101(a)(42)(A) of this title owing to a change in circumstances in the alien's country of nationality or, in the case of an alien having no nationality, in the country in which the alien last habitually resided.

(c) Status of spouse or child of alien granted asylum

A spouse or child (as defined in section 1101(b)(1) (A), (B), (C), (D), or (E) of this title) of an alien who is granted asylum under subsection (a) of this section may, if not otherwise eligible for asylum under such subsection, be granted the same status as the alien if accompanying, or following to join, such alien.

3. Section 243(a) and (h) of the Immigration and Nationality Act, as codified at 8 U.S.C. 1253(a) and (h), provides in relevant part:

§ 1253. Countries to which aliens shall be deported

(a) Acceptance by designated country; deportation upon non-acceptance by country

The deportation of an alien in the United States provided for in this chapter, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be directed to any country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory.

* * *

* * * * *

(h) Withholding of deportation or return

(1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(19) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

(2) Paragraph (1) shall not apply to any alien if the Attorney General determines that –

(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or

(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

4. 8 C.F.R. 3.2 provides in relevant part:

§ Reopening or reconsideration.

The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly au-

thorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefor was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. * * *

5. 8 C.F.R. 208.11 provides in pertinent part:

§ 208.11 Asylum requests after completion of exclusion or deportation hearing.

An alien may request that an exclusion or deportation proceeding be reopened pursuant to 8 CFR 103.5 or 8 CFR 242.22 respectively, on the basis of a request for asylum. Such request must reasonably explain the failure to request asylum prior to the completion of the exclusion or deportation proceeding. If the alien fails to do so, the asylum claim shall be considered frivolous, absent any evidence to the contrary. Nothing in this part, however, shall be construed to prevent an alien from requesting relief under section 243(h) during exclusion or deportation proceedings.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1990—282-061/20212